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Supreme Court, U.S.
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No.: (1) 07-502 [illegible]

OFFICE OF THE CLERK

In the

Supreme Court of the United States

In Re: NAZI ERA CASES,

-against-

GERMAN DEFENDANTS LITIGATION,

This matter relates to RONALD MANDQWSKY and SETH B. FELDMAN, as the Co-Executors of the ESTATE OF FERDINAND NACHER and RONALD MANDOWSKY, as Representative of the Heirs of the ESTATE of IGNATZ NACHER,

Petitioners,

-against-

DRESDNER BANK AG,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

A. Can The Executive Branch Of The United States Government Create A Federal Question Six Years After A State Court Case Is Validly Filed For The Specific Purpose Of Removing And Dismissing That State Court Case In A Federal District Court?

B. Does Such Activity By The United States Government's Executive Branch Violate The Delicate Balance Between The State And Federal Governments Called For By The United States Constitution, Tenth Amendment?

LIST OF PARTIES

The parties to the proceeding are shown in the caption.

Petitioners are not a corporation.

Respondent is a foreign bank and we have no knowledge of parent corporations or subsidiaries.

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OPINIONS BELOW

The New York State Supreme Court for Queens County issued its Preliminary Conference Order setting discovery dates in this case on June 5, 1995. See Appendix A, reproduced herein.

The New York State Supreme Court for Queens County issued its Short Form Order granting Petitioners-Appellants' Motion to Substitute Executors and denying Respondent's Motion for a Stay on October 26, 1999. See Appendix B, reproduced herein.

Thereafter, the case was removed to the U.S. District Court for the District of New Jersey pursuant to Multi-District Litigation No. 1337. The United States District Court for the District of New Jersey issued its Decision on December 5, 2000. See 198 F.R.D. 429 (D.N.J. 2000). This Decision gave judicial approval to an alternative forum for the resolution of this case in a Foundation called "Remembrance, Responsibility and the Future" established by the Federal Republic of Germany and the Government of the United States of America. See Appendix C, reproduced herein.

The said Foundation failed, neglected and refused to grant any recovery to Petitioners. Thus, Petitioners moved in the United States Court for the District of New Jersey to reopen the instant case pursuant to Federal Rules of Civil Procedure (FRCP), Rule 60(b). The U.S. District Court for the

District of New Jersey denied Petitioners-Appellants' application in a Decision dated July 6, 2006. See 236 F.R.D. 231 (D.N.J. 2006). See Appendix D, reproduced herein.

Petitioners-Appellants took an appeal of said Decision to the United States Court of Appeals for the Third Circuit, which issued its Decision and Judgment denying the appeal on July 20, 2007. See 2007 WL 2080439 (3d Cir. 2007). See Appendix E, reproduced herein.

The U.S. Court of Appeals, Third Circuit, issued this Judgment as a formal mandate on August 14, 2007. See Appendix F, reproduced herein.

JURISDICTION

The jurisdiction of this Court to review the determination of the United States Court of Appeals for the Third Circuit is conferred by 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The United States Constitution, Tenth Amendment -

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

New York State Banking Law Section 200-b (1):

> "An action or special proceeding against a foreign banking corporation may be maintained by a resident of this state for any cause of action."

STATEMENT OF THE CASE

On May 16, 1994, Petitioners' decedent, Ferdinand Nacher (who died in 1996 at the age of 95), filed his Summons and Complaint against the Dresdner Bank in the New York State Supreme Court for Queens County and was assigned Index No. 10193/94 by the Clerk of that State Court.

In 1994, Petitioners' decedent, Ferdinand Nacher, was serving as Executor of the Estate of his late uncle, Ignatz Nacher, who died in 1939 in Switzerland having been ejected from Germany in 1934. Ignatz Nacher had perfected pasteurization of beer during the 1920s and had founded a large industrial and commercial empire of breweries, malt factories, hotels, hofbraus, restaurants and beer gardens throughout Germany.

In 1934, while acting as an agent of the then-Nazi Government of Germany, the Respondent Dresdner Bank seized this entire industrial and commercial empire from the late Ignatz Nacher at gunpoint. Ferdinand Nacher had been serving as Vice-President of Ignatz Nacher's corporate entity, Engelhardt Breweries, Inc.

Ferdinand Nacher was ejected from Germany in 1934 and ultimately came to the United States. He served in the United States Army in World War II and was honorably discharged.

From 1945 to 1994, the late Ferdinand Nacher spent each and every day trying to recover his family's extensive European properties. Because of the experiences he suffered, he did not trust lawyers or government officials. He nevertheless wrote to American and German government officials repeatedly over the years seeking to obtain compensation for his family's extensive losses.

The seizure of the Nacher Family properties is known in world history as "Aryanization." The Nazi Government of Germany financed its nefarious plan to conquer Europe by seizing properties of European Jewish families. The Nacher commercial empire was among the largest. It is not an exaggeration to say that the Nacher Family was among the largest involuntary financiers of World War II. See Raul Hilberg, Professor of Political Science at the University of Vermont, The Destruction of the European Jews, revised and definitive edition, 1985, Holmes and Meier Publishers, Inc., New York, Pages 100-101, 104-122, 475, 572-574, 575, 577, 245 and 956.

In 1956, Ferdinand Nacher was partially successful in obtaining extremely limited compensation from the then-West German

Government exclusively for his family's West German properties.

In 1994, the late Ferdinand Nacher was introduced to his Estate's current counsel. Counsel for the late Mr. Nacher advised him that he could not pursue any claims for his West German properties because of the 1956 settlement. However, counsel advised Mr. Nacher that he could successfully pursue a New York State Supreme Court case for the loss of his East German properties because the New York State Banking Law, Section 200-b(1) specifically authorizes a lawsuit of this type against foreign banks operating branches in New York. The Dresdner Bank has a branch at 75 Wall Street, New York, NY. This statute provides, in pertinent part:

> "An action or special proceeding against a foreign banking corporation may be maintained by a resident of this state for any cause of action."

Thus, Mr. Nacher's State Court Complaint pled causes of action for common law fraud and conversion based on a "contract" signed by his late uncle, Ignatz Nacher, at gunpoint in a Berlin police dungeon in 1934.

Mr. Nacher's action was not barred by the New York six year Statute of Limitations for commercial cases set forth in New York Civil Practice Law and Rules (CPLR), Section 213(2) and (8) because the New York CPLR has a tolling provision.

The New York Statute of Limitations is tolled by war as set forth in New York CPLR Section 209. Germany was at war from 1938 to 1945 with the United States and/or its European allies. The Nazi Government of Germany did not honor claims of Jews to private property or lif itself from 1934 to 1945. East Germany was administered by the now defunct Union of Soviet Socialist Republics (USSR) during the period 1945 through 1990. The United States Government was conducting a "cold war" against the USSR with a front smack down the middle of Germany during those years. Numerous armies and heavy weapons including nuclear weapons, were lined up along the East German-West German border. Among other consequences, this act of "cold war" tolled the New York Statute of Limitations pursuant to New York CPLR Section 209.

Additionally, as the Dresdner Bank never returned the Nacher Family's East German properties, they continued to commit the torts of conversion and fraud each and every day the property was not returned. Thus, Petitioners alternatively successfully argued that the New York Statute of Limitations had not begun to run at all.

Needless to say, the failure of the New York Branch of the Dresdner Bank to return the Nacher Family's holdings also constitutes the crimes of criminal possession of the stolen property in the first degree in violation of New York Penal Law Section

165.54 and scheme to defraud in the first degree in violation of New York Penal Law Section 190.65.

Accordingly, Petitioners' State Court Complaint was accepted by the New York State Supreme Court for Queens County and a Discovery Order was issued by Justice Joseph M. Lane of that Court on June 5, 1995. See Appendix A. Pursuant thereto, Mr. Nacher attended his Examination Before Trial (EBT) in connection with this case. Because he was elderly and frail, the Examination Before Trial was held on August 4, 1995 at his own apartment in Forest Hills, Queens County, NY. At that time, the late Mr. Nacher was questioned extensively by New York attorneys for the Respondent, Dresdner Bank.

Mr. Nacher passed away on November 24, 1996. In his Last Will and Testament, dated April 25, 1994, Ferdinand Nacher, Individually and as Executor of the Estate of his uncle Ignatz Nacher, directed Ronald Mandowsky and Seth B. Feldman, his Executors and grand-nephews, to continue the instant case for the damages for the theft of the family's East German properties.

By 1996, Petitioners' counsel knew that they had done something very historic, and deposited a copy of the entire Nacher case file with the United States Holocaust Memorial Museum in Washington, D.C. at a meeting with its Director of Research and his staff on June 17, 1996.

In 1997 and thereafter, unbeknownst to Petitioners, 51 Holocaust-related cases were filed

around the United States utilizing theories advanced in this case in the New York State Supreme Court for Queens County, which were then available in the library of the United States Holocaust Memorial Museum in Washington, D.C.

Petitioners' counsel then proceeded to gather consents from all of the Nacher heirs all over the world. This took much effort as the documents required apostilization from Embassies in numerous foreign countries. The horrific policies of the Nazi Government of Germany had dispersed much of its Jewish population to various countries throughout the world. The remainder were executed, together with the Jewish populations of the adjacent countries wrongfully conquered by the Nazi Government of Germany utilizing the Nacher Family fortune as seed money. This has come to be known as the Holocaust, or the Shoah.

In 1999, Petitioners' counsel moved in the New York State Supreme Court for Queens County to substitute Ronald Mandowsky and Seth B. Feldman as co-Executors of the Estate of Ferdinand Nacher for Ferdinand Nacher individually, and to substitute Ronald Mandowsky as Representative of the Heirs of Ignatz Nacher as Ferdinand Nacher had passed away.

The New York attorneys for the Dresdner Bank vigorously opposed this motion. They contended that the Surrogate's Court procedures for the late Ignatz Nacher in Berlin, Germany, were done improperly. Justice Joseph G. Golia of the New York State

Supreme Court for Queens County would have none of it. He granted Petitioner's Motion to substitute executors and denied the Dresdner Bank's Cross-Motion in its entirety. Justice Joseph G. Golia of the New York State Supreme Court for Queens County issued this Decision on October 26, 1999. See Appendix B, attached hereto.

In July 2000, Petitioner's counsel received an unsolicited telephone call from United States Deputy Treasury Secretary Stuart E. Eizenstat. Deputy Secretary Eizenstat told Petitioners' counsel that he had "settled their case." Petitioners' counsel were in disbelief. "What case?" Petitioners' counsel exclaimed, "We don't have any business with the United States Treasury Department."

"Your German bank case," United States Deputy Treasury Secretary Eizenstat replied. "We have made a study of these cases and we have settled yours. Call Mel Weiss."

Following that most surprising telephone call, Petitioner's counsel communicated with the office of Mr. Weiss, a prominent class action attorney. Apparently, one of the 51 cases inspired by the Nacher case was a class action case for "slave labor" filed by Mr. Weiss. The German Government, on behalf of German banks and industry, persuaded the U.S. Treasury Department to enter into negotiations to create a Foundation, "Remembrance, Responsibility and the Future" (hereafter called the Foundation) to be funded with $10 billion Deutschmarks or approximately $5 billion in

German reparations, to compensate the innumerable plaintiffs in the existing 52 cases, plus any other Holocaust survivor in the world who wished to apply.

This foundation was created by an Executive Agreement of the United States Government. It was NOT approved by the United States Senate. It was not a treaty.

By creating the Foundation "Remembrance, Responsibility and the Future," the United States Treasury Department created a federal question herein where none previously existed. The instant matter was exclusively a proceeding in the New York State Supreme Court pursuant to New York State Banking Law, Section 200-b(1) commencing in 1994. There was no federal question whatsoever until U.S. Deputy Treasury Secretary Eizenstat created one in the year 2000 by entering into an Executive Agreement with the Federal Republic of Germany on behalf of the United States Government.

Thereafter, a Multi-District Litigation was created, No. 1337. The instant State Court case was transferred to the United States District Court for the District of New Jersey. The parties appeared before Judge William B. Bassler at the United States Courthouse in Newark, New Jersey. The chambers were full of representatives of all the largest German banks and industrial companies. Petitioners' counsel announced to the Court that "this is the accounting for World War II." You could have heard a pin drop. There was silence for several moments thereafter.

Judge Bassler communicated to all parties that the U.S. Treasury Department wanted all of these cases dismissed and voluntarily assigned to the Foundation "Remembrance, Responsibility and the Future" for payment. Liability issues were to be dispensed with. All of the plaintiffs would be compensated as determined by the Foundation. Petitioners in this case had the largest claim by far and were unwilling to so consent.

Judge Bassler sent Prof. Bert Neuborne of the New York University Law School to the offices of Petitioners' counsel. Prof. Neuborne was United States Deputy Treasury Secretary Eizenstat's negotiator for the above-named Executive Agreement. Prof. Neuborne had spent more than one year in Europe negotiating this Executive Agreement on behalf of the United States Treasury Department. He specifically did not invite Petitioners' counsel to these high level Federal Government negotiations. Judge Bassler wanted Prof. Neuborne to communicate his experiences. Prof. Neuborne told Petitioners' counsel that none of the Holocaust survivors in the world would get any compensation if Petitioners continued in their opposition to participating in the Executive Agreement. The German Government's position was that all 52 cases pending had to end and that "legal peace" had to prevail or the Executive Agreement would not go forward, and none of the Holocaust survivors in the world would be compensated by the Foundation.

The pressure was ratcheted up one notch further. Deputy Secretary Eizenstat ruled that attorneys fees would be paid in advance of any Foundation ruling. He directed all plaintiffs' attorneys for the 52 cases to submit fee applications to former United States Attorney General Nicholas Katzenbach and Kenneth Feinberg, Esq., as Fee Arbitrators. Petitioners' counsel appeared before them and were told that there would be no legal fees whatsoever if they continued to oppose participation in the Foundation.

Petitioners' counsel told former United States Attorney General Katzenbach and Judge Bassler that they were unwilling to so capitulate. Nevertheless, Petitioners' counsel recommended to Petitioner Mr. Mandowsky that he speak directly with Prof. Neuborne. Mr. Mandowsky and Prof. Neuborne had numerous conversations and exchanged e-mails. Ultimately, in December 2000, Mr. Mandowsky decided that he did not wish to hold up compensation for all of the Holocaust survivors in the world, and he consented to participate in the Foundation, on behalf of himself and his co-executor, Mr. Feldman.

Thereafter, Judge Bassler issued his opinion approving the comprehensive "settlement" comprising the Foundation. See Appendix C, printed at 198 F.R.D. 429 (D.N.J. 2000).

Petitioners subsequently submitted their application and details of their extensive losses to the Foundation "Remembrance, Responsibility and the Future."

On May 25, 2004, the Foundation denied Petitioners' claims in their entirety, based on their wrongful determination that Engelhardt Breweries, Inc. was not "a German enterprise" and that Petitioners did not qualify as "sufferers." Petitioners asked for reconsideration by the Foundation. On July 18, 2005, after another year passed, the Foundation determined that the Petitioners would get no recovery whatsoever. All of the available funds of the Foundation had been distributed by this time.

Petitioners then brought a Motion pursuant to the Federal Rules of Civil Procedure, Rule 60(b) seeking relief from Judge Bassler's December 5, 2000 Decision approving the Foundation, and requesting that the *Nacher v. Dresdner Bank* case be permitted to proceed in the United States District Court for the District of New Jersey since the Foundation totally failed, neglected and refused to properly consider said case. When Petitioners agreed to participate in the Foundation, they were repeatedly assured by Prof. Bert Neuborne, Judge Bassler and U.S. Deputy Treasury Secretary Eizenstat that their claims would be carefully considered, and an award most probably made.

Judge Bassler denied Petitioners' FRCP Rule 60(b) Motion on July 6, 2006. See Appendix D. This Decision is published at 236 F.R.D. 231 (D.N.J. 2006).

Petitioners duly filed their appeal with the U.S. Court of Appeals for the Third Circuit in Philadelphia, PA. The U.S. Court of Appeals for the Third Circuit, in an unpublished Decision, denied Petitioner's appeal to that Court. See attached Appendix E, published at 2007 WL 2080439 (3d Cir. 2007) but otherwise unpublished.

Thereafter, Petitioners have prepared and filed this Petition for Certiorari to this Court.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

When this case commenced in 1994, there was absolutely no basis whatsoever for any jurisdiction of any type in the United States District Court in any district. This was strictly a State Court case between a New York State resident and the New York State branch of a foreign bank. Cases of this type are specifically within the jurisdiction of the New York State Courts pursuant to New York State Banking Law, Section 200-b (1).

The Dresdner Bank created federal jurisdiction in this case in the year 2000, six years later, by pressuring the Government of the Federal Republic of Germany to approach the Government of the United States of America to create a federal question by creating the Foundation, "Remembrance, Responsibility and the Future" pursuant to Executive Agreement of the United States Federal

Government. Up until this point, there was no federal question.

This can be easily understood from the history of this case. From the years 1994 through 2000, the Dresdner Bank made no effort whatsoever to remove this State Court case to any Federal Court. They only did so after the Executive Agreement was signed between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation "Remembrance, Responsibility and the Future" in July 2000. Respondent Dresdner Bank created a federal question by causing the United States Federal Government to create this Foundation together with the German Government.

Judge William Bassler of the U.S. District Court for the District of New Jersey then asserted federal jurisdiction upon the grounds that there was now, as of the year 2000, a "federal question" in this case pursuant to 28 U.S.C. Section 1331. In addition, the U.S. District Court asserted its jurisdiction pursuant to 28 U.S.C. Section 1407 in that numerous similar cases were referred to Judge Bassler and consolidated under MDL No. 1337, including this case.

REASONS FOR GRANTING THE WRIT

A. *The Executive Branch of the United States Government cannot create a federal question six years after a State Court case is validly filed for the specific purpose of removing and dismissing that State Court case in a Federal District Court.*

The United States is a federal country. The delicate balance between the rights and duties of the 50 State Governments and the central Federal Government are finely tuned in our United States Constitution.

The original intent of the Framers of the United States Constitution was to create parallel State and Federal Court systems.

Perhaps the most important Founding Father was Alexander Hamilton, the first United States Treasury Secretary. He addressed this question in his classic work on this subject, published with co-Founding Fathers and co-authors James Madison and John Jay, The Federalist Papers. In Federalist No. 82, Alexander Hamilton described the intellectual rationale for the interrelationship of our State and Federal Courts:

> "...I am even of the opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the cause to which those acts may give birth. This I infer from the nature of judiciary

> power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion of our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited." (See Hamilton, Madison, and Jay, The Federalist Papers, New American Library Edition, Edited by Prof. Clinton Rossiter, New York, 1961, Page 493) (emphasis added).

Alexander Hamilton would be appalled at what happened in this case. If Alexander Hamilton was still the United States Treasury Secretary, he absolutely would not have permitted one of his Deputies to telephone a member of the New York State Bar Association and instruct him that his State Court case in his local county State Court would be "taken over" by the Federal Government! That is absolutely not what Hamilton had in mind when he wrote Federalist No. 82.

Ron Chernow, one of Alexander Hamilton's most prominent biographers, writes of Hamilton's role in creating a strong United States Federal Government. However, Chernow writes carefully that Hamilton was in favor of maintaining the rights of the various states to continue their important governments in partnership with the newly created central Federal Government. Chernow writes about Hamilton's speech to a New York State convention in Poughkeepsie, New York, considering the newly written United States Constitution:

> "Hamilton made a superb speech about the powers that would be reserved to the states under the Constitution, showing, for instance, how the federal government could not make laws affecting the punishment of certain crimes, such as murder and theft." See Ron Chernow, Alexander Hamilton, the Penguin Press, New York, 2004, Page 266.

In that same Poughkeepsie speech in 1788, Hamilton argued that "the states were useful and necessary." See Chernow, Page 267.

Alexander Hamilton would have been shocked at U.S. Deputy Treasury Secretary Eizenstat's year 2000 telephone call to Petitioners' counsel announcing cavalierly that the Federal Government had "settled your case" referring to a pending State Court case in which the Federal Government was not a party.

History is clear on this point. Chernow appears to have reviewed nearly every documentary record of Hamilton's tenure as U.S. Secretary of the Treasury. Hamilton never took over any pending State Court cases while serving as the nation's first Treasury Secretary.

The noble aims of resolving the wrongs of the Nazi Era do not justify the instant high-handed Federal intrusion in State Court system litigation.

The United States Constitution, Tenth Amendment, forbids federal officials to take over State Court cases. The Tenth Amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Research does not reveal any reported case where a high federal official reached into the State Court system where the Federal Government was not a party, and took it upon himself to enter into negotiations to settle that State Court case without notifying the Petitioners. This appears to be something brand new in American history, something that has not happened in 218 years of recorded American judicial history.

Will this Court allow such a naked exercise of federal power over State Court proceedings where the Federal Government is not a party, and there is no existing federal question? Will this Court allow

federal officials to create a federal question where none previously existed in a pending State Court proceeding?

B. *The takeover of a State Court case by the Executive Branch of the United States Government violates the delicate balance between the State and Federal Governments called for by the United States Constitution, Tenth Amendment.*

In *Gonzales v. State of Oregon*, 546 U.S. 243 (2006), this Court directly addressed a bitter conflict between State and Federal Governmental power. The State of Oregon enacted the Oregon Death with Dignity Act (ODWDA). Oregon Revised Statutes, Section 127.800 et seq. This statute permitted Oregon physicians to assist terminally ill Oregon residents to commit suicide.

The United States Congress passed the Controlled Substances Act (CSA), 21 U.S.C. Section 801. The United States Attorney General maintained that the use of certain drugs by Oregon physicians to assist Oregon residents in suicide violated the Federal CSA. Under these circumstances, this Court held:

> "Although balancing the necessary respect for an agency's knowledge, expertise, and constitutional office with the court's role as interpreter of laws can be a delicate matter, familiar principles guide us. An administrative rule may receive substantial deference if it interprets the issuing agency's

> own ambiguous regulation. *Auer v. Robbins*, 519 U.S. 452, 461-463, 117 S. Ct. 905, 137 L.Ed.2d 79 (1997). An interpretation of an ambiguous statute may also receive substantial deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 104 S. Ct, 2778, 81 L.Ed.2d 694 (1984). Deference in accordance****915** with *Chevron*, however, is warranted only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, ***256** and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). Otherwise, the interpretation is "entitled to respect" only to the extent it has the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)."

In *Gonzales v. Oregon*, this Court stood firmly with the State of Oregon against the encroaching misuse of federal authority by federal officials.

Applying this Court's *Gonzales v. State of Oregon* reasoning to the instant case, it is clear that instant Petition for Certiorari must be granted. Here, we are not faced with "an agency's knowledge, expertise and constitutional office." We are faced with a naked grab of state judicial power by the Federal Executive Branch. There is no basis in law for such an act. Research does not reveal any case or statute which

gives the United States Deputy Treasury Secretary the power to take over a pending State Court case where the Federal Government is not a party and there is no federal question.

If the Decisions below are permitted to stand, there will be precedent for an unacceptable imbalance in our federal system. In the future, federal officials will be guided by the United States District Court for the District of New Jersey's opinion in *In Re: Nazi Era Cases*, cited above, and the U.S. Court of Appeals, Third Circuit's affirmance thereof. Federal officials will be permitted to grab State Court cases willy-nilly and decide these cases for themselves. It is respectfully submitted that such activity is the hallmark of a dictatorship. It is the very type of activity that the United States Government went to war in World War II to prevent. It interferes with a key principle of our democracy - a judiciary independent of the Executive Branch.

Indeed, New York City is the financial jewel of our country. It functions as the capital of capitalism. Domestic and foreign banks all operate in New York City or wish to. The United States Federal Government enhanced New York's permanent role as the world's economic capital when the Truman Administration decided to locate the United Nations Headquarters in New York City. This Federal Government decision inevitably confirmed the fact that every domestic and foreign bank would wish to exist alongside the United Nations and the Embassy of every country in the world.

It then became incumbent upon the State of New York to open its courts to the inevitable conflicts involving all the foreign banks located in New York City.

Certainly, the Federal Courts, which are courts of limited jurisdiction, are not prepared to cope with the onslaught of litigation caused by the location of every foreign bank in New York City. The result was New York State Banking Law, Section 200-b(1) which permits "an action or special proceeding against a foreign banking corporation" to be "maintained by a resident of this state for any cause of action." This statute was passed in 1964 soon after foreign banks started opening offices in New York *en masse* following the location of numerous foreign embassies in New York City to attend to their business at the United Nations Headquarters.

In *Banco Ambrosino SBA v. Artoc Bank & Trust Ltd.*, 62 N.Y. 2d 65 (1984), an Italian banking corporation was permitted to maintain a New York action against a Bahamas banking corporation concerning a contract to be performed within the State of New York.

A Netherlands corporation's action against a Russian bank was permitted in the New York Courts in *Indosuez International Finance BV v. National Reserve Bank*, 98 N.Y. 2d 238 (2002).

In *J. Zeevi and Sons Ltds. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y. 2d 220 (1975), an Israeli

partnership was permitted to sue a Ugandan bank in the New York Courts.

Indeed, New York State Banking Law Section 200-b(1) is as essential and important to the economy of the State of New York as the Oregon Death with Dignity Act (ODWDA) was important to the citizens of the State of Oregon in *Gonzales v. State of Oregon*, cited above.

This Court considered a similar unlawful federal encroachment on state authority in *Federal Martime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002). In that case, this Court upheld the right of the South Carolina Ports Authority (a State Government agency) to be immune from suit from the Federal Maritime Commission (a Federal Government agency). This Court's opinion in that case wisely defined the delicate balance between state and federal authority:

> "Dual sovereignty is a defining feature of our Nation's constitutional blueprint. See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). See 535 U.S. at 751.

In *Federal Maritime Commission v. South Carolina State Ports Authority*, this Court had no

trouble deciding the case in favor of the State of South Carolina. Federal authority has its limits.

In the instant case, we are faced with a naked grab of federal power into the State Court system. This Court must grant this Petition for a Writ of Certiorari to make perfectly clear that our constitutional system does not permit high federal officials to reach into the State Court system, pull out viable State Court cases, and decide them at the Federal Executive level. This type of behavior by high federal officials is intolerable in our federal system as guaranteed to us by the Tenth Amendment. This Court must clearly address the important and independent role of the authority of States and their State Court systems.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should be granted.

Dated: October 4, 2007
New York, NY

Respectfully Submitted,

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MARC C. LEAVITT
JOSEPH N. YAMANER
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PRELIMINARY CONFERENCE ORDER
PURSUANT TO PART 202 OF THE
UNIFORM CIVIL RULES OR THE SUPREME COURT
QUEENS COUNTY INDIVIDUAL ASSIGNMENT PART 21

FERDINAND NACHER
Plaintiff(s) Index Number : 010193/94

Against Conference Number:____

DRESDNER BANK Conference Date: June 5, 1995
Defendant(s)

Appearances

Plaintiff(s) Marc Leavitt, Esq.
Defendant(s) William M. Barron, Esq.

I. Insurance Coverage: Defendant_____
Defendant_____
___If Not Furnished,
Plaintiff to be
Advised in
___Writing By_____

II. Bill of Particulars:___1. Not Submitted: Action Marked Off Calendar, or_____

2(A). Submitted Satisfactory ___

2(B). Unsatisfactory __

3. Supplemental Bill of Particulars to Be Served__

4 Bill of Particulars for Affirmative Defenses to Be Served _____

_____

III. Medical Reports and Hospital Authorizations: __ 1. Furnished (Except):__

__ 2. Medical reports or Authorizations for records to be served.

__3. Hospital Authorization to be served___

_____

_____

IV. Physical Examination: __ 1(A). Held (Other than Transit) __1 (B) Waived

__ 1 (C). Examination of_____

To be held_____

_____

__ 2 (A). Physician's Report Furnished Plaintiff

__ 2 (B) Copy of physician's report to be furnished to plaintiff within_____ Days of Examination

V. Examination Before Trial : 1.__ Plaintiff __ Defendants __ All Parties

2. To Be Held July 20, 1995 with Production of the 1956/1957 Sales Agreement (Kautveres) 7 days before and related Document

__ 3. Held (Except):

___ Waived

VI. Other Disclosure:

__ 1. None

__ 2. All Parties to exchange name and addresses of all witnesses, opposing parties statements and photographs. If none, an Affirmation to that effect shall be exchange.

__ 3. Authorizations for plaintiff(s) Employment record (IRS) Including W-2 for Period_____

__ 4.Plaintiff to serve corrected Interrogatories by June 8, 1995 Defendant to Respondent by July 11, 1995.

__ 5. To Be Completed _____

VII. Impleader Actions:

1. (A) __ None 1 (B) __ To Be Completed_____

* Concerning Any Settlement reached in the same Period (1956/1957) to the extent that same are in this possession Custody or control.

IX. Preferences
__ (A) 3403(A)-CPLR Granted
__ (B) 3403 (A) – Denied
__ (C) (A)- CPLR Held in Abeyance Pending Further Application Motion

X. Additional Directives :
__ 1. Court Reports Minutes Incorporated in order
__ 2. See attached page for Additional Directives.
__ 3. None

XI Is Directed to file a note of issue Certification of Readiness on or before_____

XII. When filing the note of issue and certificate of readiness the filing party shall serve a copy of this order, together with an Affirmation stating compliance with all Directives of this order and an Affidavit of Service on the Trial Clerk(Room 158) and all Parties. In the event of non-Compliance, Costs or other sanctions may be imposed. This constitutes the Decision and Order of the Court.

Dated: June -5 1995

Enter: Hon. Joseph M . Lane
J.S.C

All dates contained herein relating to the completion of items in this order must be adhered to. Counsel may not enter into any adjournments without further order of this Court.

SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF QUEENS
I A PART 21
JOSEPH G. GOLIA, JUSTICE

FERDINAND NACHER, individually and as Executor of the Estate of Ignatz Nacher, Plaintiffs,	Index No. 10193/94 Motion Date: 9/29/99
-against-	Motion Cal. No.
Dresdner Bank, Defendant.	2 and 48

The following papers numbers 1 to 5 read on this motion to substitute party plaintiff and motion to stay such substitution and for deposition.

	Papers Number
Notice of Motion- Affidavits – Exhibits	1 - 2
Answering Affidavits- Exhibits	3
Memo of Law.	4 - 5

Motions numbered 3 and 48 are consolidated for the purpose of this order.

Plaintiff's motion for leave to amend the caption to reflect the substitution of " Ronald H. Mendowsky and Seth B. Feldam as Co- Executors of the Estate of Ferdinand Nacher and Ronald H. Mandowsky as

Representative of the Heirs of the Estate of Ignatz Nacher" in place and stead of the present plaintiff is granted.

Defendants motion to stay the hearing and determination of plaintiff's motion and to compel dispositions of the representatives of the deceased plaintiff is denied.

It appears from all the papers and documents submitted that the substituted parties are the proper parties in this matter and the case shall therefore proceed.

Dated: October 26, 1999

_____

J.S.C

In re Nazi Era Cases Against German Defendants Litigation
198 F.R.D. 429
D.N.J.,2000.
Dec 05, 2000
198 F.R.D. 429

Motions, Pleadings and Filings

United States District Court,
D. New Jersey.
In re NAZI ERA CASES AGAINST GERMAN DEFENDANTS LITIGATION
This Matter Relates to all Cases [FN1] in Which Plaintiffs Have Sought Voluntary Dismissal With Prejudice [FN2]

FN1. This opinion applies to all cases listed in Appendix A.

FN2. Not all Plaintiffs have sought voluntary dismissal of their actions. This opinion is in no way meant to address the merits of those actions in which Plaintiffs oppose dismissal of their claims.

MDL No. 1337.
No. 98-4104 (WGB).
Dec. 5, 2000.

Persons subjected to slave or forced labor, or appropriation of their property, by German

government during World War II sued German business firms benefitting from government action, seeking reparations. Following consolidation of actions, and prior to class action certification, parties sought permission to dismiss suits with prejudice, required as condition of proposed settlement under which payments would be made to victims from newly created fund. The District Court, Bassler, J., held that: (1) dismissals could be approved without giving notice to absent class members, and (2) dismissals would be approved, as settlement was noncollusive and nonprejudicial to class members. Voluntary dismissals approved.

West Headnotes

[1] Federal Courts 170B

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)5 Multi-District Litigation; Transfer for Pre-Trial Proceedings
170Bk157 k. Effect of Transfer and Subsequent Proceedings. Most Cited Cases

In determining whether voluntary dismissal with prejudice is appropriate, in suits brought in various jurisdictions and consolidated pursuant to statute governing multi-district litigation, transferee court is to apply law of its supervisory circuit, while giving due consideration to rulings of other circuits. 28

U.S.C.A. § 1407; Fed.Rules Civ.Proc.Rules 23(e), 41(a), 28 U.S.C.A.

[2] Federal Civil Procedure 170A

170A Federal Civil Procedure
170AXI Dismissal
170AXI(A) Voluntary Dismissal
170Ak1696 k. Class Actions. Most Cited Cases

Not yet certified class actions are subject to federal procedure rule requirements that judicial approval be obtained prior to voluntary dismissal.

Fed.Rules Civ.Proc.Rules 23(e), 41(a), 28 U.S.C.A.

[3] Compomise and Settlement 89

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k56.1 k. In General. Most Cited Cases

170A Federal Civil Procedure KeyCite this headnote
170AXI Dismissal
170AXI(A) Voluntary Dismissal
170Ak1696 k. Class Actions. Most Cited Cases

Trial court deciding whether to approve settlement and voluntary dismissal with prejudice of not yet certified class action is to inquire whether settlement and dismissal is tainted with collusion or will prejudice absent members of putative class. Fed.Rules Civ.Proc.Rules 23(e), 41(a), 28 U.S.C.A.

[4] Comprise and Settlement 89

89 Compromise and Settlement
89I In General
89k14 Operation and Effect
89k17 Conclusiveness
89k17(2) k. Persons Concluded. Most Cited Cases

Settlement of class action, entered into prior to class certification, lacks res judicata effect as to all but the representative plaintiffs. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[5] Comprise and Settlement 89

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k68 k. Notice and Communications. Most Cited Cases

170A Federal Civil Procedure

170AXI Dismissal
170AXI(A) Voluntary Dismissal
170Ak1708 k. Notice. Most Cited Cases

Notice to absent class members, of proposed settlement of not yet certified class action and dismissal of suit with prejudice, is not required when there is no evidence of collusion between named plaintiffs and defendants and no evidence of

prejudice to absent class members. Fed.Rules Civ.Proc.Rules 23(e), 41(a), 28 U.S.C.A.

[6] Federal Civil Procedure 170A

170A Federal Civil Procedure
170AXI Dismissal
170AXI(A) Voluntary Dismissal
170Ak1696 k. Class Actions. Most Cited Cases

170A Federal Civil Procedure

170AXI Dismissal
170AXI(A) Voluntary Dismissal
170Ak1708 k. Notice. Most Cited Cases

Court would approve voluntary dismissal with prejudice, without requiring notice to putative class members, of consolidated uncertified class actions brought by persons subjected to slave and forced labor, or expropriation of property, due to actions of German government during Second World War, when result of approval would be to trigger settlement providing for payments to named plaintiffs and others of class at uniform rates, determined as result of arms length negotiation involving German government and industry and other foreign governments, with attorney fees amounting to only 1.25% of funds, and with nonparticipating class members free to bring their own action. Fed.Rules Civ.Proc.Rules 23(e), 41(a), 28 U.S.C.A.

**430* Allyn Z. Lite, Lite Depalma Greenbert & Rivas, LLC, Newark, NY, Barry A. Fisher, Fleishman & Fisher, Los Angeles, CA, for Plaintiffs. [FN3]

> FN3. A full list of appearances is listed in Appendix B. The Court wishes to express its appreciation to Allyn Lite, Prof. Burt Neuborne, John Gibbons, Roger Witten, and Thomas Valen for their tireless efforts and assistance to the Court.

John J. Gibbons, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, A Professional Corporation, Newark, NJ, for Defendants.

OPINION

BASSLER, District Judge.

The German National Socialist ("Nazi") era of the 1930's and 1940's will forever be remembered for its virtually unparalleled systematic brutality and inhumanity. Complicit in this bureaucratic barbarism, committed at the time by a modern industrialized state, were numerous German companies and businesses who employed slave and forced labor, appropriated private property, and committed other wrongs against individuals. Plaintiffs are former slave and forced laborers, as well as others who suffered at the hands of German companies during the Nazi era, who have now brought claims against those companies. Their cases were consolidated before the Court as the result of a

"motion for centralization," pursuant to 28 U.S.C. § 1407, brought before the Judicial Panel on Multidistrict Litigation ("MDL Panel"). MDL Transfer Order, Docket No. 1337 (August 4, 2000). In the overwhelming majority of these consolidated cases, Plaintiffs have sought voluntary dismissal with prejudice.

In its transfer order, the MDL Panel indicated that common to the some 53 actions before the Court are claims against German companies, including banks, insurance companies, and industrial corporations, (collectively "German Industry"), arising from conduct occurring during the Nazi era. These cases were transferred in light of "an important international agreement which promises to present significant common pretrial issues pertaining to the settlement or dismissal of the actions." MDL Order at 2.

The "important international agreement" referenced in the Transfer Order is that embodied in the German Foundation "Remembrance, Responsibility and the Future" ("The Foundation"). The Foundation is the result of a collaboration among American plaintiffs' attorneys, representatives of German Industry, numerous foreign governments including the United States, Germany, and Israel, and other non-governmental organizations. The Foundation was designed to provide some compensation to the many surviving victims of the Nazi era whose claims rest on the conduct of German Industry during that period. In exchange for receiving this compensation,

victims agree to provide German Industry with legal peace.

As agreed to during negotiations, the Foundation provides that before any victims receive their compensation, the legal peace promised to German Industry must be secured, in the form of dismissal with prejudice of all law suits pending in the courts of the United States brought by victims against German Industry. In light of the Foundation's requirements, of the 53 cases that were pending before the Court, Plaintiffs in 49 actions either noticed or moved for voluntary dismissal of their claims, with prejudice. Additionally, Defendant companies in the remaining cases have also moved to dismiss with prejudice, on a wide array of legal grounds. Of the 49 cases where Plaintiffs moved to voluntarily dismiss, 42 were brought as putative class actions under Rule 23 of the Federal Rules of Civil Procedure.

While individual actions may be dismissed on stipulation of the parties, cases brought as putative class actions may only be dismissed upon approval of the Court. The procedure for this approval, and a determination of whether notice to the putative class is required under Rule 23(e), are the focus of this opinion.

After thorough consideration of the voluminous briefs and affidavits filed with the court, including a letter from the German **431* Ambassador and a Statement of Interest of the United States Government, and after conducting a lengthy public

hearing on November 13, 2000, the Court ruled that these 42 putative class actions may be voluntarily **dismissed with prejudice,** and that **notice to members of the putative class pursuant to FRCP 23(e) is not required.** The Court also ruled that these dismissals are **expressly subject to F.R.C.P. 60(b).** With appropriate orders already entered following the Court's ruling from the bench, this opinion expresses in more detail the rationale for the Court's decision.

I. BACKGROUND

The atrocities of the Nazi era and World War II are well documented, as are the more than five decades of international treaties and agreements that have sought to partially atone for them. *See Burger-Fischer v. DeGussa AG,* 65 F.Supp.2d 248 (D.N.J.1999); *Iwanowa v. Ford Motor Co.,* 67 F.Supp.2d 424 (D.N.J.1999) (detailing the post-war arrangements for reparations prior to the creation of the Foundation). [FN4] Plaintiffs have all sought recovery against German Industry for its alleged role in these atrocities, on the grounds that their injuries were not redressed by prior arrangements for reparations. [FN5]

> FN4. "The German Government's restitution and compensation programs
>
> addressing Nazi era and World War II wrongs...have been identified by the United Nations as '[t]he most comprehensive and systematic precedent of reparation by a Government to groups of victims for the redress

of wrongs suffered....' " Memo. in Supp. of Mot. of all Defendants to Dismiss all Remaining Claims in all Actions with Prejudice as to the Named Defendants, at 21 (*quoting Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedom,* U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess. Provisional Agenda Item 4 at 55, ¶ 107, U.N.Doc. E/CN. 4/Sub. 2/1993/8 (Certification of John J. Gibbons in Support of Motion of All Defendants to Dismiss All Remaining Claims in All Actions With Prejudice as to the Named Plaintiffs, Vol. XV Exh. 41 at 65)); *See also,* Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts,* 34 U. Rich. L.Rev. 1 (2000).

FN5. *See* Allyn Z. Lite, *Another Attempt to Heal the Wounds of the Holocaust,* 27 Human Rts. 12 (2000); Stuart M. Kreindler, Comment, *History's Accounting: Liability Issues Surrounding German Companies For the Use of Slave Labor by Their Corporate Forefathers,* 18 Dick. J. Int'l. L. 343 (2000); Darcie L. Christopher, Note, *Jus Cogens, Reparation Agreements, and Holocaust Slave Labor Litigation,* 31 Law & Policy in Int'l. Bus. 1227 (2000); Justin H. Roy, Comment, *Strengthening Human Rights Protection: Why the Holocaust Slave Labor Claims Should Be*

Litigated, 1 Scholar: St. Mary's L.Rev. Minority Issues 153, 177 (1999).

The great majority of Plaintiffs before the Court sought the voluntary dismissal of their claims with prejudice so that they could recover from the new German Foundation. As the Court's approval of these dismissals hinged on both the nature of the negotiations leading to formation of the Foundation and on the impact of the Foundation on putative class members, this opinion initially sets forth some of the history and scope of this ground-breaking agreement.

A. *History of the Negotiations*

The negotiations which culminated with the creation of the Foundation began in the Fall of 1998, when the German Government asked Stuart E. Eizenstat to help facilitate a resolution of the numerous class action law suits pending in the United States against German companies who utilized slave and forced labor, and committed other wrongs, during the Nazi era. Decl. of Stuart E. Eizenstat ¶ 5 (attached as Exh. 1 to the Statement of Interest of the United States ("Statement of Interest")). Eizenstat is currently Deputy Secretary of the Treasury and Special Representative of the President and the Secretary of State on Holocaust Issues, but at the time acted as Under Secretary of State for Economic Affairs. *Id.* at ¶ 1.

Over a year and a half, Eizenstat co-chaired a series of formal and informal discussions among lawyers

for both Plaintiffs and Defendants and the German Government on a "proposed initiative to establish a foundation to make payments to victims of slave and forced labor and all others who suffered at the hands of German companies during the Nazi era." *Id.* at ¶ 5. Also participating in these discussions were the State of Israel, ***432** the governments of Belarus, the Czech Republic, Poland, Russia, and Ukraine, and the Conference on Jewish Material Claims Against Germany, which is an umbrella organization representing numerous international Jewish non-governmental organizations. *Id.* at ¶ 6. Through these numerous participants--which included interested parties on both sides of the litigation before the Court, as well as legally disinterested third parties--the interests of victims were "broadly and vigorously" represented, as were the interests of Defendant corporations. *Id.*

According to Plaintiffs' attorneys who participated in the bulk of the meetings and conferences, the negotiations were intensive, lengthy, hard-fought, and conducted at arms length. Decl. of Stephen A. Whinston in Supp. of Anolik Plaintiffs' Mot. for Approval of Voluntary Dismissal with Prejudice ¶ ¶ 1-2; Decl. of Morris A. Ratner in Supp. of Mot. for Voluntary Dismissal at ¶ 14. The negotiations began with the parties far apart on virtually every issue, "ranging from the total amount of money, to its allocation among various types of claims, to the extent of coverage." Whinston Decl. ¶ 2.

The quasi-formal initiative which had been on-going since February, 1998, was publicly announced by

German Chancellor Gerhard Schroeder, as well as a group of German companies, on February 16, 1999. Eizenstat Decl. ¶ 7. After the public announcement, twelve formal conferences chaired by representatives of the United States and German Governments were held to discuss the initiative. *Id.* As a result of these conferences, and following the personal involvement of U.S. President Clinton and German Chancellor Schroeder, [FN6] in December, 1999, it was agreed that a foundation would be established, in exchange for which plaintiffs would dismiss their claims against German defendants. *Id.* at ¶ 8.

> FN6. *See* Letter from President William Clinton to German Chancellor Gerhard Schroeder (Undated) ("Clinton Letter"), Attached as Exh. 3 to the Statement of Interest.

After "extremely difficult" negotiations, the precise terms of funding for the foundation and of how those funds would be allocated were reached. *Id.* at ¶ 10. These negotiations were only successful after compromises were made by "all parties," Whinston Decl. ¶ 2, and were the result of "vigorous arms length bargaining" between all present. Decl. of Burt Neuborne in Supp. of Plaintiffs' Mot. Pursuant to Rule 23(e) to Dismiss the Claims of Putative Class Members Without Prejudice ("2nd Neuborne Decl.") ¶ 7.

In July, 2000, almost two and a half years after negotiations began, the German Parliament passed a law creating the Foundation "Remembrance, Responsibility and the Future," which closely

embodied the detailed agreements reached by the parties to the negotiations. Eizenstat Decl. ¶ 11. The parties gathered in Berlin on July 17, 2000, to sign a Joint Statement concluding the negotiations, and expressing their support for the Foundation. *Id.* at ¶ 12. The Governments of the United States of America and the Federal Republic of Germany simultaneously signed an Executive Agreement, which memorialized the specific commitments of the two Governments to the Foundation. *Id.*

B. *The Foundation Agreement*

The law which actually created the Foundation as a legal entity [FN7] was promulgated in Germany on August 12, 2000. Eizenstat Decl. ¶ 13. On October 19, 2000, in accordance with the Executive Agreement, the United States and German Governments exchanged diplomatic notes, [FN8] stipulating that the agreement officially entered into force on the date of the exchange. *Id.*

FN7. *Gesetz Zur Errichtung Einer Stiftung "Erinnerung; Verantwortung und Zukunft."* Translated as "Law on the Creation of a Foundation

'Remembrance, Responsibility and Future' " (*cited as* "Foundation Law"). All subsequent references to the Foundation Law in this opinion are to the English language translation, Attached as Exh. 2 to the Statement of Interest.

FN8. Attached as Exh. C to the Statement of Interest.

As established under the Foundation Law, the Foundation will make payments to Nazi era victims. *Id.* at ¶ 15; Foundation Law § 1(1). These payments will come out of a total fund with an initial capitalization of DM ***433*** 10 Billion. *Id.* at ¶ 16; Foundation Law § 3(2). This money shall be contributed in equal shares by the German Government and German Industry. *Id.*

Those who suffered at the hands of German Industry during the Nazi era, including those who worked as slave or forced laborers for the Nazi regime, were subjected to medical experimentation, were held in a "kinderheim" (children's home), had property "aryanized", stolen, or damaged, or whose insurance policies went unpaid will be eligible to recover. Eizenstat Decl. ¶ ¶ 15-17. Eligible claimants are either those who personally were victims, or the heirs of victims who died after February 16, 1999. *See* Foundation Law § 13. It is estimated that the Foundation will cover approximately one million victims across the United States, Eastern and Central Europe, and the rest of the World. Statement of Secretary of State Madeline K. Albright, on the Establishment of the German Foundation "Remembrance Responsibility and the Future." (October 20, 2000) (Attached as Exh. 4 to the Statement of Interest).

Each type of victim is entitled to a different rate of recovery under the Foundation Law. Each former slave laborer [FN9] will recover up to DM 15,000, and each former forced laborer [FN10] will recover up to DM 5,000. Eizenstat Decl. ¶ 16. Total

payments to these two groups will exceed DM 8 Billion. *Id.; See* Foundation Law § 9. Those who suffered other non-labor related personal injuries, such as injuries from medical experimentation, are eligible to apply for pro-rata payments from a separate DM 50 million pool. Eizenstat Decl. ¶ 16. All property claimants are eligible to recover a pro-rata share of a DM 200 million fund set aside for that purpose, with a similar DM 550 million fund set aside for insurance claims and a DM 300 million humanitarian fund set aside for those unable to document specific claims. *Id.*

> FN9. Slave laborers are those who were intended to be literally worked to death. Eizenstat Decl. ¶ 16.
>
> FN10. Forced laborers are those who were compelled to work against their will, but in somewhat less harsh conditions than slave laborers. Eizenstat Decl. ¶ 16.

All victims, not merely those currently named as plaintiffs in legal actions, may apply for recovery from the Foundation. [FN11] Eizenstat Decl. ¶ 20. This was an important goal during negotiations, as "throughout the negotiations, attorneys representing the victims vigorously represented not only the named plaintiffs in their cases, but also the interests of heirs and others who are similarly situated." *Id.* As the Foundation Law is designed to actually benefit victims, a provision has been included seeking to protect claimants from any reduction in pension payments that might otherwise result from

the receipt of a lump sum of money. Foundation Law, § 15(1).

> FN11. Any previous compensation an individual has received from other sources for Nazi injustices will be counted against any potential payments a victim might be entitled to recover under the Foundation Law. Foundation Law, § 15(2).

Payments to individuals will not be made directly by the Foundation; rather seven distinct partner organizations [FN12] will handle the actual collection and processing of applications, and the distribution of payments. Eizenstat Decl. ¶ 23; *See generally* Foundation Law, § 10. Each organization is allocated specific funds, based on the estimated number of applicants they will have. *Id.* The application process itself will be short, simple, non-bureaucratic, non-adversarial, and will not require legal representation. Eizenstat Decl. ¶ 25. Determinations of eligibility are to be made on relaxed standards of proof, and a free appeals process will be available. *Id.;* Foundation Law § 19.

> FN12. Five are geographically based, specifically covering 1) Poland; 2) Ukraine and Moldova; 3) the Russian Federation, Latvia, and Lithuania; 4) Belarus and Estonia; and 5) the Czech Republic. The Conference on Jewish Material Claims Against Germany is responsible for payments to Jews located worldwide, outside the five geographic

> organizations. The International Organization for Migration is responsible for all other payments worldwide, outside the five geographic organizations. Eizenstat Decl. ¶ 23; Foundation Law § 9(2).

Given the advanced age of the victims, the primary humanitarian objective of the Foundation is to show results as soon as possible. Joint Statement, ¶ 2. For this reason, the ***434** Foundation has mechanisms allowing for expedited payments. Eizenstat Decl. ¶ 19. It is the goal of the Foundation to begin payments to slave and forced labor victims as soon as all those cases pending in the United States that are listed in Annexes C and D to the Joint Statement have been dismissed with prejudice. *See* Statement of Interest, Exh. A. Property claims are expected to be paid within one year from the close of the application period. Eizenstat Decl. ¶ 27. The processing of insurance claims has already begun. *Id.*

In addition to the payments to victims, Foundation Law § 2(2) designates DM 700 million for a Future Fund, which is designed to promote tolerance and Holocaust awareness, and to support projects that benefit the heirs of those forced and slave laborers who did not survive. Eizenstat Decl. ¶ 19.

Out of the total fund of DM 10 Billion, only DM 200 Million has been allocated to administrative and legal fees. Eizenstat Decl. ¶ 19. By side agreement, modest payments (no more than 15,000 DM) will also be made out of attorneys fees to each named

plaintiff in the United States that voluntarily dismisses their claims with prejudice. Whinston Decl. ¶¶ 3(c), 6; Ratner Decl. ¶ 15. These payments were insisted on because only the named plaintiffs are being asked to dismiss their cases with prejudice prior to the receipt of compensation, Whinston Decl. ¶ 6, and because the negotiations which eventually ended up benefitting the entire class were only commenced by virtue of the named plaintiffs "coming forward to bring this issue into focus and thereby exposing a painful chapter in their lives in a very public way." *Id.;* Decl. of Stephen G. Rinehart in Supp. of *Blau* Plaintiffs' Mot. for Approval of Voluntary Dismissal with Prejudice ¶ 3(e).

The total fee award to all attorneys has been cumulatively capped at DM 125 million, or 1.25% of the total capitalization of the Foundation. Eizenstat Decl. ¶ 19. The negotiations for attorneys fees and stipends for named plaintiffs were not initiated until all the other material terms of the agreement had been reached. Whinston Decl. ¶ 4; Ratner Decl. ¶ 14. They were neither agreed to nor understood to be forthcoming during the negotiation of the material terms of the agreement. Whinston Decl. ¶ 4.

Attorneys must seek fees from the Foundation through an arbitration process. Eizenstat Decl. ¶ 19. This arbitration process will be binding, and will award proportional fees to the various attorneys that represent different plaintiffs. Whinston Decl. ¶ 5. The arbitration will be conducted by two arbitrators; Nicholas Katzenbach, appointed by the German

Government, and Kenneth Feinberg, appointed by the United States Government. *Id.*

The Foundation will be run by a Board of Trustees, composed of 27 members equally representing the interests on both sides. Eizenstat Decl. ¶ 21; Foundation Law §§ 4(1), 5. It is presently chaired by the German Ambassador to the United Nations, and is managed by a three person Board of Directors. Eizenstat Decl. ¶ 18; Foundation Law §§ 5(1)(1), 4(2), 6. The Board of Directors and the Board of Trustees will together make decisions on those matters not covered by the enabling Foundation legislation. *Id.; See* Foundation Law §§ 5-6. The Foundation is to be run in a transparent and public manner, and is subject to both legal oversight and auditing by the German Government. Eizenstat Decl. ¶ 22; Foundation Law § 8.

C. *The Role of the United States*

1. *The Executive Agreement*

Unlike typical international agreements, the Agreement between the Governments of the Federal Republic of Germany and the United States of America concerning the Foundation "Remembrance, Responsibility and the Future" is not a government-to-government claims settlement agreement. Eizenstat Decl. ¶ 14. Rather than extinguishing the legal claims of its nationals or anyone else, the United States merely helped facilitate an agreement between victims, German Industry, and the German Government. *Id.* By acting in this manner, the

United States' goal was to "bring expeditious justice to the widest possible population of survivors, and to help facilitate legal peace." *Id.*

***435** In keeping with this, the United States agreed to, via the filing of a Statement of Interest in all pending cases, "advise U.S. courts of its foreign policy interests...in the Foundation being treated as the exclusive remedy for World War II and Nazi era claims against German companies, and, concomitantly, in current and future litigation being dismissed." *Id.; See* Executive Agreement, Art. 2 & Annex B.

2. *The Statement of Interest of the United States*

In accordance with the Executive Agreement, the United States has filed with this Court a Statement of Interest with attachments, designed to articulate both the Government's "foreign policy interests with regard to the German Foundation 'Remembrance, Responsibility and the Future' ..., and the public interest in the cooperative resolution of claims for restitution and compensation arising out of the Holocaust." Statement of Interest, at 1-2. While the Statement of Interest is non-binding on the Court, the Government "recommends dismissal on any valid legal ground." *Id.* at p. 2. [FN13] Specifically, the United States Government believes that:

> FN13. The Statement of Interest does not address the merits of any legal claims before the Court. The Statement of Interest merely argues for dismissal on "any valid legal ground." *See*

Statement of Interest, at 21-22.

[A]ll claims against German companies arising from their involvement in the Nazi era, including but not limited to claims relating to slave and/or forced labor, aryanization, medical experimentation, placement in children's homes, other cases of personal injury, and damage to or loss of property, including banking assets and insurance policies, should be pursued through the Foundation instead of the courts.

Eizenstat Decl. ¶ 28.

The position of the United States Government recommending dismissal is motivated by the twin concerns of justice and urgency: matters of Holocaust-era restitution are best resolved through dialogue, negotiation, and cooperation as opposed to prolonged and uncertain litigation; and this provides some measure of justice and compensation to aged victims in their lifetimes. *See* Statement of Interest, at 2; Eizenstat Decl. ¶¶ 3, 29.

The Statement of Interest notes that the Foundation exemplifies the successful implementation of policies that the Government favors, because it is the result of the parties, governments, and non-governmental organizations together reaching a plan for restitution and compensation through dialogue, negotiation, and cooperation. Statement of Interest, at 3. As President Clinton indicated, both the United States and German Governments "believe in the historical and moral significance of bringing a sense

of justice to former slave and forced laborers and others who suffered at the hands of German banks, insurance companies, and other German companies during the Nazi-era. We can help restore a measure of human dignity to those who suffered and survived." Clinton Letter, at 2.

It is the opinion of the Government that the "creation and successful operation of the Foundation is in the enduring and high interests of the United States," Eizenstat Decl. ¶ 28, for a number of reasons. Of primary importance to the Plaintiffs and to the putative class, it may allow for "some measure of justice to Holocaust survivors and other victims of the Nazi era, who are elderly and are dying at an accelerated rate, in their lifetimes." *Id.* at ¶ 29. The Foundation will, "without question, provide benefits to more victims, and will do so faster and with less uncertainty than would litigation, with its attendant delays and legal hurdles." *Id.* at ¶ 30. It will also benefit all who have been injured by German Industry, not merely those who have been injured by the few surviving elements of German Industry that are within the limited reach of the courts of the United States. *Id.*

For the large number of victims living in the former communist countries of Central and Eastern Europe, the Foundation will provide their first opportunity for relief, as they were until now denied recovery under existing plans for reparation. *Id.* at ¶ 35. ***436** These mostly non-Jewish surviving laborers were largely overlooked by previous plans. *Id.*

It is the opinion of the United States that the alternative to the Foundation "would be years of litigation whose outcome would be uncertain at best, and which would last beyond the expected life span of the large majority" of victims. Eizenstat Decl. ¶ 36. As dismissal of *all* the pending lawsuits is also requisite to *any* payment being made by the Foundation, the United States supports such dismissal as soon as possible, so that Germany may have legal peace, and the victims may have recovery. *Id.*

Fifty five years after the end of World War II, nearly $100 billion in current dollars has already been paid by way of reparations to the victims of Nazi atrocities. *Id.* The Foundation adds another $4.3 billion, which for the first time includes the significant contributions of the German private sector. *Id.* In sum, it is the position of the Government that:

All participants in the negotiations accepted the level of the Foundations' funding, eligibility criteria, payment system, and the allocation of its funding among various categories of victims. No amount of money could truly compensate plaintiffs for the wrongs done to them. But the payments they will receive through the Foundation will serve as a recognition of their suffering and will enable them to live with less difficulty than would be the case without the payments. In addition, creation of the Foundation will allow establishment of the Future Fund, which will be dedicated in part to efforts to ensure that crimes like the Holocaust never will

happen again, and will also fund projects that serve to benefit the heirs of victims that did not survive. The United States, together with the participating lawyers for the victims and all other parties to the negotiations, therefore believes that the Foundation is fair under all the circumstances. The creation of the Foundation, the United States hopes, will serve as an example to other nations and in other cases where resolution of claims by victims of the Nazi era for restitution and compensation has not yet been achieved.

Eizenstat Decl. ¶¶ 31-32.

D. *Implementation of the Foundation*

As previously mentioned, while the Foundation is not properly a "settlement" in the legal sense, German Industry and the German Government have insisted on the dismissal of all pending litigation in the United States, as a pre-condition to allowing the Foundation to make payments to victims. Eizenstat Decl. ¶ 37. The rationale is that, given the substantial contribution (a planned DM 5 Billion) of German Industry, they should not be asked or expected to contribute again for any wrong arising from the Nazi era. Executive Agreement, at 3.

The dismissal of the remaining active law suits in the United States is the only remaining pre-condition that must be fulfilled prior to the payment of reparations to victims in these cases. *See* Letter from Jürgen Chrobog, German Ambassador to the United States, to the Court, dated October 9, 2000

("Chrobog Letter"), at 3. These dismissals must be with prejudice to the named plaintiffs, but will not prejudice the rights of putative class members. Whinston Decl. ¶ 3(e); Rinehart Decl. ¶ 3(e). Once the last case is dismissed, the Foundation should apparently be ready to make payments, as detailed below.

The Foundation administration is up and running, according to Prof. Burt Neuborne, who is both an attorney for a number of Plaintiffs and who holds the seat allocated to an American lawyer for the plaintiffs on the Foundation Board of Trustees. The first meeting of the Foundation Board of Trustees took place in Berlin on August 31, 2000. Decl. of Burt Neuborne in Supp. of Mot. for Voluntary Dismissal ("1st Neuborne Decl.") ¶¶ 1, 3. The Board of Trustees is chaired by Dr. Dieter Kastrup, Germany's Permanent Representative to the United Nations. 2nd Neuborne Decl. ¶ 10. The Board of Trustees functions as the policy-making and ultimate governance organ of the Foundation. *Id.* at ¶ 11.

The three person Board of Directors, the executive arm of the Foundation, was duly ***437** elected at a second meeting of the Board of Trustees on September 20, 2000. *Id.* at ¶ 3. The Board of Directors is composed of Avi Primor, Vice President of Tel Aviv University and former Israeli Ambassador to Germany; Dr. Hans-Otto Brautigam, a former German Ambassador to the United Nations and former state Minister of Justice; and Dr. Michael Jansen, a former member of the German

Foreign Service who during negotiations was a member of the German industrial delegation. *Id.* Dr. Jansen was elected Chair of the Board of Directors, and is now a full-time employee of the Foundation. *Id.*

The Board of Directors has secured the services of Gunther Saarthof, "a past member of the parliamentary delegation of the Green Party with a long and respected record of efforts to provide justice to victims of National Socialism." 2nd Neuborne Decl. ¶ 11. Mr. Saarthof has been vested with operational authority for the distribution of the DM 8.1 Billion allocated to slave and forced laborers. *Id.* Through Mr. Saarthof, the Foundation has been working with the partner organizations to negotiate formal contracts detailing the procedures by which the victims are to be identified and the funds disbursed. *Id.* at ¶ 12. These partner organizations have also begun ambitious publicity programs (detailed in section I(E) of this opinion, *infra*). *Id.* at ¶ 14.

The Governments of the United States and Germany are now bound to their commitments in support of the Foundation, for as previously indicated, the exchange of notes between the United States and German Governments took place at 4:00 PM on October 19, 2000. 1st Neuborne Decl. ¶ 5(B). As a result of this exchange of notes, the Executive Agreement has been in effect since that date. *Id.*

Lastly, the Foundation has become economically viable. 2nd Neuborne Decl. ¶ 15. The German

Government has already made its initial payment of DM 2.5 Billion to the Foundation, and is scheduled to make its second payment by the end of 2000. *Id.* German Industry is also publicly committed to making its payment of DM 5 Billion, with appropriate interest, as soon as the cases still pending in America are dismissed. *Id.* Concerns do exist, however, as to whether German Industry will in fact achieve full funding of its DM 5 Billion share. Joint Decl. of Kenneth F. McCallion and Pompeyo Roa Realuyo in Supp. of Mot. for Dismissal ("McCallion/Realuyo Decl.") ¶ 4.

E. *Victims' Awareness of the Foundation*

The Foundation has begun a process designed to ensure that the maximum number of applicants worldwide are made aware of the opportunity they have to apply for benefits from the Foundation. Eizenstat Decl. ¶ 24. The Extensive global media publicity that has followed the creation of the Foundation has aided in this effort. *See* Ratner Decl. ¶¶ 2-11. A sampling of articles from the United States, Israel, and countries as far afield as South Africa show not just coverage of the Foundation, but coverage of the Foundation's impact on legal proceedings in the United States. *Id.* Specifically, the articles note that payment by the Foundation is contingent on all pending cases in the United States being dismissed, and that the United States will seek to block future filings of class action suits against German Industry. *Id.*

Through its partner organizations, the Foundation has begun publicity programs worldwide. 2nd Neuborne Decl. ¶ 13.

The International Organization for Migration has commenced a program to not only provide information to potential claimants, but to aid in filling out the necessary forms. 2nd Neuborne Decl. Exh. B. The partner organization for Poland has also engaged in an outreach program by holding regular information meetings for victims, creating an Internet web site, setting up a toll-free number, and placing ads in dozens of newspapers and periodicals. 2nd Neuborne Decl. Exh. C. The other regional organizations are engaging in similar programs. *Id.* at ¶ 13. The Jewish Material Claims Conference has used "earned media, paid media, direct mail and organizational outreach to provide notice and assistance to persons throughout the world," including advertising in at least 26 countries on five continents, via the targeting of 273 publications with a combined readership of **438* almost 21 million. 2nd Neuborne Decl. ¶ 13, Exh. D.

In addition to working through its partner organizations, the Foundation, at its third and most recent Board of Trustees meeting on November 2, 2000, allocated a budget of DM 15 million for additional notice and outreach programs, to be implemented directly by the Foundation. 2nd Neuborne Decl. ¶ 13. This was adopted over and above the already substantial existing programs of the partner organizations. *Id.* This program is

designed to fill in any gaps that may exist in the coverage of the partner organizations. *Id.*

It is the position of the United States that the negotiators of the agreements leading to the establishment of the Foundation had the requirements of F.R.C.P. 23(e) in mind when they "committed the Foundation to broad public notice of its existence, objectives, and the availability of funds," so as to avoid the prospect that any absent class member might be prejudiced from having relied on the pendency of a class action to protect their rights, should that action subsequently be dismissed without individual notice to them. Statement of Interest, at 22-23. The determination of whether notice of dismissal to the putative class is mandated by Rule 23(e) is the central issues addressed by this opinion.

II. ANALYSIS

A. *Voluntary Dismissals Generally*

Federal Rule of Civil Procedure 41(a) governs voluntary dismissals of actions. As previously indicated, this opinion deals only with those cases in which the Plaintiffs have pursued voluntary dismissal. The remaining cases in which dismissal has been opposed by Plaintiffs will be decided at a later date by the Court.

The portion of Rule 41(a) relevant to the Court's analysis states, "[s]ubject to the provisions of Rule

23(e) ...an action may be dismissed by the Plaintiff without order of court..." Fed.R.Civ.P. 41(a).

The handful of cases before the Court that were commenced as individual actions in which Plaintiffs have sought dismissal [FN14] could clearly have been dismissed without action of the Court under Rule 41(a)(1), but in the interest of thoroughness the Court has entered orders dismissing those cases with prejudice.

FN14. See Appendix A of this opinion.

Unlike the individual actions, the remaining cases, those which were brought as putative class actions (the majority of the actions before the Court), could not have been dismissed without court approval. Rule 41(a) explicitly states it is "subject to" the provisions of Rule 23(e), [FN15] which provides as follows:

FN15. The statement that rule 41(a)(1) is "subject to the provisions of Rule 23(e)" should not be read to exclude the dismissal of class actions from Rule 41(a)(1). Quite to the contrary, "the 'subject to' clause merely incorporates the procedures of rule 23(e), that is, court approval and appropriate notice, into the stated provisions of rule 41(a)(1)." *Larkin General Hospital, Ltd. v. American Telephone and Telegraph Co.*, 93 F.R.D. 497, 499-500 (E.D.Pa.1982).

Dismissal or Compromise. A class action shall not be

dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs.

Fed.R.Civ.P. 23(e).

The combination of Rule 41(a) and Rule 23(e) are clearly drafted to take away a class action plaintiff's right under Rule 41(a)(1) to voluntarily dismiss without approval of the court. It is unclear on the face of Rule 23(e) whether it applies to class actions that have yet to be certified, and what the extent of its notice requirements actually are.

[1][2] In interpreting Rule 23(e), the Third Circuit has held that any "suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper." *Kahan v. Rosenstiel,* 424 F.2d 161, 169 (3d Cir.1970), *cert. denied sub nom. Glen Alden Corp. v. Kahan,* 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970), *citing* ***439** *Philadelphia Electric Co. v. Anaconda Am. Brass Co.,* 42 F.R.D. 324 (E.D.Pa.1967). [FN16] Several other circuits agree, *See McArthur v. S. Airways, Inc.,* 556 F.2d 298 (5th Cir.1977); *Glidden v. Chromalloy Am. Corp.,* 808 F.2d 621 (7th Cir.1986); *Diaz v. Trust Territory of Pac. Islands,* 876 F.2d 1401 (9th Cir.1989), as do scholars. *See* 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d,* § 1797 at 346-50 (1986).

> FN16. When dealing with cases that have been consolidated for pretrial proceedings pursuant to an order of the MDL Panel under 28 U.S.C. § 1407, the law of the transferor forum merits close attention, but should not be read to have stare decisis effect in a transferee forum situated in another circuit. *See In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C.Cir.1987). For this reason the Court will apply the law of the Third Circuit, with due consideration given to the rulings of other circuits.

Circuit courts, however, are not unanimous in their application of Rule 23(e) to class actions prior to certification, with the Fourth Circuit's widely cited decision in *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir.1978), being a notable exception to the rule embraced by the Third, Fifth, Seventh, and Ninth Circuits. Even in *Shelton*, however, the Fourth Circuit found on the basis of fiduciary duty that an uncertified class action should not be settled without the court's approval. *Id.* at 1302-05.

Although class actions have not been certified in any of the cases presently before the Court, it is clear to the Court in light of the foregoing interpretations of Rule 23(e) that the putative class actions before it may not be dismissed without approval. Court approval of a dismissal pursuant to Rule 23(e) prevents the class action device from being used in an abusive manner, *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61, 65 (S.D.Tex.1977), as it allows a

court to ensure that the representative plaintiffs have not settled or dismissed their claims to the prejudice of a prospective class prior to certification, and ensures that the class action is not being used by plaintiffs to secure a collusive private settlement. *See, e.g., Glidden,* 808 F.2d at 626-27; *Simer v. Rios,* 661 F.2d 655, 665 (7th Cir.1981); *Shelton,* 582 F.2d at 1314; *Larkin,* 93 F.R.D. at 500.

The fear of these abuses stems partially from the fact that plaintiff's counsel typically serves as the negotiator on behalf of the named plaintiff and the asserted class. *Magana,* 74 F.R.D. at 65. The concern is that " 'absent appropriate judicial inquiry...[a] plaintiff's attorney may accept an insufficient judgment for the class in trade for immediate and certain compensation for himself in the form of legal fees deducted from the total available funds proffered by defendant.' " *Id. quoting Foster v. Boise-Cascade, Inc.,* 420 F.Supp. 674, 686 (S.D.Tex.1976).

Even if the named plaintiffs and defendants in a case reach a settlement that is seemingly fair and untainted, prospective class members may still be prejudiced, as the termination of the representative action may also terminate the vehicle to recovery upon which those un-named members relied. *See Diaz,* 876 F.2d at 1409-10; *Shelton,* 582 F.2d at 1315. [3] In order to avoid these hazards, a district court should make a "proper inquiry" to determine whether a proposed settlement and dismissal are tainted by collusion or will prejudice absent members of the putative class. *Shelton,* 582 F.2d at 1315; *Diaz,* 876 F.2d at 1408. When engaging in this

inquiry, a court need not perform the sort of substantive oversight required when reviewing the settlement of a certified class, nor need it engage in the laborious duty of conducting a certification determination, as the dismissal is not res judicata against the putative class. *Shelton,* 582 F.2d at 1311; *Diaz,* 876 F.2d at 1408. [FN17]

> FN17. Scholars have also supported more modest standards for approval of voluntary dismissals in the pre-certification context than for dismissals after certification of a class action. *See, e.g.,* Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present, and Future,* p. 58 (Federal Judicial Center Monograph 1977); *Notice of Proposed Dismissal or Compromise of Class Action to Absent Putative Class Members in Uncertified Class Action Under Rule 23(e) of Federal Rules of Civil Procedure,* 68 A.L.R. Fed. 290, 1984 WL 263449 (1984).

When contemplating the dual aims of avoiding collusion and prejudice, the focus should primarily be on the possibility that the pre-certification compromise is the product ***440** of collusion. *Shelton,* 582 F.2d at 1314 n. 55, *citing Magana,* 74 F.R.D. at 67. The *Magana* court placed greater emphasis on the collusion analysis, as it is in the pre-certification phase that the possibility of "legalized blackmail" of defendants with the threat of potential class-wide liability is at its height, and plaintiffs are most likely

to sacrifice their previously-asserted class interests for private gain. *Id.*

When focusing on the possibility of collusion, a court should conduct a careful, factual inquiry into the terms of the settlement, particularly the amount paid the plaintiff in purported compromise of his individual claim and the compensation to be received by plaintiff's counsel. *Shelton,* 582 F.2d at 1315. It has also been held that in an inquiry into collusion, without any evidence to the contrary, a court may accept as sufficient counsels' representations that there has been no collusion or bad faith underlying their motivation in dismissing the class claims. *In re Towers Fin. Corp. Noteholders Litig.,* 1998 WL 64151, *1 (S.D.N.Y.1998), *referring to Chichilnisky v. Tru. of Columbia Univ.,* 1993 WL 452526 (S.D.N.Y.1993).

The rationale for placing "less weight" on the prejudice analysis is that a "pre-certification dismissal does not legally bind absent class members," and, before certification, the absent putative class member has at best a speculative reliance interest. *Shelton,* 582 F.2d at 1314-15, *quoting Magana,* 74 F.R.D. at 69. As a part of the prejudice analysis, this reliance interest, which will vary according to the facts of each case, must be taken into account. *Magana,* 74 F.R.D. at 67.

If, after a careful, factual inquiry a court finds neither collusion nor prejudice to be present, it may approve the dismissal. *Diaz,* 876 F.2d at 1408; *Shelton,* 582 F.2d at 1316. If, on the other hand, a

court should find that the settlement was tainted or will prejudice the interests of putative class members, rather than reject the dismissal the court should do no more than require notice and allow an opportunity to intervene. *Id.*

B. *Rule 23(e) Notice Requirement*

When confronted with the dismissal of a certified class action, Rule 23(e) requires not just court approval, but such notice of the settlement to members of the class as the court directs. Fed.R.Civ.P. 23(e). In the context of a putative class action, court mandated notice of dismissal serves largely the same purposes as court approval of dismissal. *Diaz*, 876 F.2d at 1409.

Requiring notice forces a representative plaintiff to consider their duties to the putative class, which is in keeping with the goal articulated in *Philadelphia Electric*, that "no litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class of litigants." 42 F.R.D. at 328; *Diaz*, 876 F.2d at 1409.

Requiring notice can also deter frivolous class actions, as the time and cost of effecting notice should make a plaintiff consider carefully the consequences of filing a class claim. *Simer v. Rios*, 661 F.2d at 665. Given the potential cost to themselves, "[t]he notice requirement prevents plaintiffs from appending frivolous, 'boiler plate' class claims or class claims they never intend to litigate." *Diaz*, 876 F.2d. at 1409, *citing Simer*, 661

F.2d at 665; *Shelton,* 582 F.2d at 1310-11; *Muntz v. Ohio Screw Prod.,* 61 F.R.D. 396, 398 (N.D.Ohio 1973); *Yaffe v. Detroit Steel Corp.,* 50 F.R.D. 481, 483 (N.D.Ill.1970).

[4] Another concern justifying notice is the prospect of harm to absent class members. After certification "notice of the settlement is necessary as a matter of constitutional due process [as] an individual's claim cannot be extinguished without notice and an opportunity to be heard." *Simer,* 661 F.2d at 664. This due process concern is not present in a putative class action, as a settlement entered prior to class certification lacks res judicata effect as to all but the representative plaintiffs. *Simer,* 661 F.2d at 664- 65. Until a class is certified, the interest of putative class members must be classified as speculative. *Magana,* 74 F.R.D. at 69-70.

[5][6] The primary interest of putative class members is their reliance interest in the pending litigation; the primary purpose of notice to the putative class is to inform these individuals that they may no longer rely on the asserted class action vehicle, so ***441** that these putative class members may then commence their own actions. *Id.*

It is generally uncontested that the court approval requirement of Rule 23(e) is absolute, [FN18] and most of the early decisions on notice similarly found its requirements to be absolute. *See Simer,* 661 F.2d at 664-65 (extensive citations omitted). Despite the fact that the language of Rule 23(e) is mandatory in character, *See Zeffiro v. First Pennsylvania Banking*

and Trust Co., 82 F.R.D. 31, 33 (E.D.Pa.1979) (citations omitted); 7A *Moore's Fed. Prac.* § 1797, at 234,unlike the court approval requirement there is increasing agreement that notice to putative class members of a pre-certification dismissal or compromise is not mandated by Rule 23(e). *Diaz*, 876 F.2d at 1407; *Gupta v. Penn Jersey Corp.*, 582 F.Supp. 1058, 1060 (E.D.Pa.1984), *citing to Shelton*, 582 F.2d 1298, *and Magana*, 74 F.R.D. 61 (additional citations omitted).

> FN18. "[W]hat may not be dispensed with is the district court's approval of the elimination of an uncertified class claim." *Glidden*, 808 F.2d at 627-28.

While the Third Circuit has not squarely addressed the issue of requiring notice of voluntary pre-certification dismissal, other courts have found room for a more flexible, reasonable approach to notice, which should depend on whether the facts surrounding a compromise or settlement dictate the necessity of notice to prevent Rule 23 abuse, or to protect the interests of putative class members. *Shelton*, 582 F.2d at 1310-11, *citing Magana*, 74 F.R.D. at 67. This interpretation is grounded in the language of Rule 23(e) that notice "shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e); *See Larkin*, 93 F.R.D. at 502. Many courts have broadly interpreted this provision by holding that, given the facts of a particular case, "no notice" may be a permissible

form of notice available at the direction of the court. *See Id.*

The rationale behind this interpretation is that an absolute notice requirement, while effectively enforcing the policy of Rule 23, may cause notice to issue unnecessarily when the spirit of Rule 23 is not violated, often at the expense of other important individual and institutional policies. *Simer,* 661 F.2d at 665; *Larkin,* 93 F.R.D. at 502. Requiring Rule 23(e) notice and full class treatment of every putative class action would be both time consuming and costly. The result of such an absolute rule could harm the potential beneficiaries (the putative class) that the rule was meant to protect. Instead of preventing the filing of frivolous class action suits, the costs of a strictly applied notice rule could prevent meritorious suits from ever being brought. The significant time delay that can be involved in providing notice may also further injure putative class members waiting for the relief that they rightly deserve. *See Id.*

Rather than insist on a narrow, strict interpretation of Rule 23(e), the more enlightened approach adopted by courts "avoids judicial time expenditure and relieves the parties of the expense of notice when it is appropriate, without circumventing the policies of Rule 23(e)." *Gupta,* 582 F.Supp. at 1060, *quoting* H. Newberg, *Class Actions* § 2620 at 240 (1977). This approach as to whether notice is required avoids the very real danger that requiring notice in all situations--even when the risk of collusion and prejudice are clearly negligible--will

stifle the beneficial settlement of a case solely because it is pled as a class action. *See Shelton,* 582 F.2d at 1311.

Courts have also held that even absent evidence of prejudice or collusion, notice may still be required whenever the "fair conduct of the action" requires it. *Id.; See, e.g., Larkin,* 93 F.R.D. at 503 ("Because the policies of Rule 23(e) would not be served by ordering notice in this case, it would truly be exalting form over substance to force plaintiff to bear what is in my view a wholly unnecessary burden"). After examining an individual request for dismissal, if it is determined that it does not violate the function of the rule (that neither harm to the class nor evidence of collusion are present), the court may find notice of dismissal to be unnecessary. *Larkin,* 93 F.R.D. at 503.

The rule allowing for dismissal without notice after factual review by the court has come to be called the "Functional Approach." ***442** [FN19] It dictates that "if there is no evidence of any collusion between the named plaintiffs and the defendants in seeking the dismissal and no evidence of any prejudice to absent class members," notice to absent class members is not required. *Anderberg,* 176 F.R.D. at 689 (extensive citations omitted).

> FN19. *See* J. Spencer Schuster, note, *Precertification Settlement*
> of Class Actions: Will California Follow the Federal Lead?, 40 Hastings L.J. 863, 887 (1989); *Anderberg v. Masonite Corp.,* 176 F.R.D. 682,

689 (N.D.Ga.1997); *Magana*, 74 F.R.D. at 68-71.

The court should undertake a careful factual analysis, and require notice only where it would accomplish the dual purposes of class protection and prevention of rule 23(e) abuse. Magana, 74 F.R.D. at 68. "A functional approach to the notice requirement is viewed as preferable to a mandatory notice rule in that the difficulties and expense of pre-certification notice can be avoided in those instances where notice would not realistically further the dual aims of Rule 23(e)." Id. at 68.

While courts should presume that the possibility of abuse in an individual settlement and class dismissal at the pre-certification stage is sufficient to warrant notice, notice should not be compulsory. Magana, 74 F.R.D. at 69. "When notice would be a fruitless yet costly gesture," Rule 23(e) should not be read to compel the parties to incur pointless expense. Glidden, 808 F.2d at 627-28.

This approach is in keeping with the policies in favor of settlement, as it will allow settlement of individual claims and dismissal of class allegations without burdensome notice, but only in those circumstances where representative plaintiffs receive proportionate recoveries and the absent class members do not suffer prejudice. See Diaz, 876 F.2d at 1409; Shelton, 582 F.2d at 1311; 2 Newberg on Class Actions § 11.63 at 503, n.407 (2d ed.1985).

The circuit court in *Simer v. Rios* placed discretion in district courts "to assess the prejudice to absent class

members caused by the settlement, the institutional costs of notice and a certification hearing, as well as other factors relevant to this determination," including collusion, and then determine whether notice should be required. 661 F.2d at 666. While those guiding words are not binding on this Court, the reasoning behind them is persuasive. As such, this Court has focused its attention on the circumstances surrounding the establishment of the German Foundation, in order to determine whether those circumstances mandate the institution of notice to putative members of the class, prior to the voluntary dismissal with prejudice of the named Plaintiffs' claims.

C. Dismissal with Prejudice of Plaintiffs' Claims

At the conclusion of the November 13, 2000 hearing, after a thorough review of the affidavits and other documents submitted, the Court ruled that there was absolutely no evidence in the record of collusion, and no real prospect of prejudice to the putative class from allowing dismissal without notice. Having made these findings, the Court declined to require notice, and allowed the representative Plaintiffs to voluntarily dismiss their actions with prejudice. The Court has reached these conclusions for the reasons fully articulated below. [FN19]

> FN19. The Court explicitly notes that nothing in this opinion should be interpreted as approving the fairness of the Foundation, or as reaching the merits of class certification. As guided by the decisions in *Diaz* and *Shelton*, this Court

> has only examined the issues of collusion and prejudice, and their impact on voluntary dismissal in the pre-certification context. *See* 876 F.2d at 1408, 582 F.2d at 1311.

Broadly put, the Court is convinced that dismissal of the putative class actions with prejudice and without notice was the most appropriate course of action, given the absence of collusion, and the negligible risk of harm from dismissal without notice. Additionally, there was a great likelihood that the cost and delay associated with a court mandated notice program would be prejudicial to an aging putative class that sadly grows measurably smaller by the day. [FN20]

> FN20. *See In re Austrian and German Bank Holocaust Litigation*, 80 F.Supp.2d 164, 172 (S.D.N.Y.2000) (noting that delay would be intolerable and cause certain prejudice to elderly claimants who have already endured decades of waiting for compensation).

*443 Examining first the prospect of collusion, affidavits document that the negotiations, lasting several years, were adversarial and conducted at arm's length. Eizenstat Decl. ¶ 6; Whinston Decl. ¶¶ 1-2; Ratner Decl. ¶ 2; 2nd Neuborne Decl. ¶ 7. These were not closed, back room proceedings designed to benefit only a few. Unlike the typical settlement negotiation in a civil litigation, these talks were conducted under the watchful eye of the international community, and designed to benefit literally millions around the world. *See Id.*

While some Plaintiffs' counsel did in fact serve as negotiators of the settlement, there were in addition numerous governmental and non-governmental actors directly involved in the bargaining process. *Id.* The participation of these third parties, including the numerous victims organizations represented by the Conference on Jewish Material Claims Against Germany, actively protected the interests of the putative class. Eizenstat Decl. ¶ 6. It should be noted that a number of the named Plaintiffs who asked for voluntary dismissal with prejudice in light of the Foundation did not participate in the negotiations leading to the Foundation. Rinehart Decl. ¶ 5. That individuals who did not participate in the negotiations now wish to seek relief undermines any concern about collusion.

Without any evidence to the contrary, a court may accept as sufficient counsels' representations that there has been no collusion or bad faith underlying their motivation in dismissing the class claims. *See Towers Financial Corp., 1998 WL 64151 at *1; Pennsylvania Nurses Assoc. v. Comm. of Pennsylvania,* 1987 WL 109018, *2 (M.D.Pa.) (accepting stipulation of parties, supported by evidence, that collusion is not a factor, where settlement is beneficial to entire class, and where press coverage of the settlement and dismissal was likely to have done away with any reliance interest that the putative class action might have created). In the cases at hand, in addition to the representations of counsel, the nature of the final agreement itself negates the possibility that the settlement is the product of collusion.

First, it is clear that Defendants did not buy off the class representatives. All victims will recover equally based on the nature of the harm they suffered, via a process that does not differentiate between named Plaintiffs and putative class members. Eizenstat Decl., ¶ 20. While Plaintiffs' counsel did secure a stipend for those named Plaintiffs that dismiss their claims with prejudice, and while putative class members are not eligible to receive this stipend, these payments are not evidence of collusion, nor will they prejudice the putative class.

This stipend was negotiated only after compensation for the entire class had been secured, and will come out of the total amount previously allocated for attorneys fees. Whinston Decl. ¶¶ 3(c), 6; Ratner Decl. ¶ 15. [FN21] Named Plaintiffs did not breach their fiduciary duty to the putative class in securing the stipend; the individual payments to them merely represent compensation for their individual sacrifices to the class. Id. Given that the named Plaintiffs are at present the only parties who have been asked to legally prejudice themselves by dismissing their claims, the amount of the stipends are not disproportionate to what the putative class will eventually receive.

> FN21. There seems to be some debate between the parties about whether these stipends will be paid directly to named Plaintiffs out of the Foundation's fund for attorneys fees, or whether they will be paid by each named Plaintiffs' counsel directly to their clients, out of the fees awarded to counsel by the arbitrators. *See*,

> Defendants' Response to Plaintiffs' Mot. to Dismiss as to Specific Named Plaintiffs, Annex A at 1. In either event, it is the Court's understanding that these payments will not be made out of the Foundation's funds that have been set aside for victim compensation.

As noted in *Shelton*, mere payment to plaintiffs isn't enough to require notice; only disproportionate payment is. While the amount of the compromise payment is an important fact to be given careful consideration in resolving the possibility of collusion, it should be weighed with all the other circumstances surrounding the settlement. *Shelton*, 582 F.2d at 1315. As the other *444 circumstances surrounding the settlement have suitably demonstrated to the Court that the settlement was not the product of collusion, dismissal was appropriate.

Notably, the named Plaintiffs will not be in a substantially better position after the settlement than will absent class members, as aside from the previously discussed stipend they all stand to recover the same amount from the Foundation. Eizenstat Decl. ¶ 20. This settlement is also not entirely about money, as a large component of it is about German Industry accepting responsibility for past injustices, in an effort to provide closure for all. In this regard the money paid to victims, both named and unnamed, is as symbolic as it is beneficial, although it will be of great benefit to those impoverished victims living in Central and

Eastern Europe. See McCallion/Realuyo Decl. ¶ 4. The Future Fund will also benefit both named Plaintiffs and the putative class, because it is designed to prevent the victimization of others in the future, out of respect for those who have suffered in the past. Eizenstat Decl. ¶ 19; Foundation Law § 2(2).

While it is undeniable that the bargaining power of Plaintiffs was strengthened by the mere presence of class claims, it is arguable that, but for the class claims, no settlement would have been reached, as negotiations would have never commenced. See Eizenstat Decl. ¶ 5. This is evidence not of an abuse of the Rule 23 process, but of the inherent power of the class device, as the attachment of class claims allowed for a comprehensive settlement that benefitted the entire putative class, not just the named Plaintiffs. See, *e.g.*, *Larkin*, 93 F.R.D. at 503. The class claims in these cases were not merely "boiler plate," added in an effort to get a quick, advantageous settlement for the named Plaintiffs, but genuine causes of action that Plaintiffs intended to fully litigate on behalf of the entire class. [FN22] *See Diaz*, 876 F.2d at 1409 (Absent indication that class allegations were appended only to get favorable individual settlements, there is no reason to require notice as a deterrent to hypothetical abusive plaintiff).

> FN22. In this regard the Court is reminded of the remarks of Rudolph Van Jhering, who wrote "[t]he struggle for law is the duty of a person having rights, to himself. And the assertion of

> one's legal rights is a duty which he owes to society. Concrete law not only receives life and strength from abstract law, but gives it back, in turn, the life it has received. It is of the nature of the law to be realized in practice. A principle of law never applied in practice, or which has lost its force, no longer deserves the name. Under the circumstances, the lot of the few who have the courage to enforce the law becomes a real martyrdom. Their strong feeling of legal right, which will not permit them to quit the field, becomes a curse to them. The defense of one's concrete legal rights, when these rights are attacked, is a duty of the individual whose rights had been invaded, not only to himself, but also to society. If what I have said be true, that in defending his legal right he, at the same time defends the law, and in the law that public order, which is indispensable, who can deny that, in defending them, he fulfills a duty to the commonwealth?" *The Struggle for Law,* at ___ (1925).

It was also readily apparent to the Court that this settlement was not reached solely to obtain attorneys fees. Counsel for Plaintiffs repeatedly evidenced a motivation to secure adequate benefits for the entire group of victims, as opposed to securing compensation only for themselves or for the named Plaintiffs. Statement of Interest, at 23. Plaintiffs' attorneys will only be eligible to receive approximately 1.25% of the total pot, which is exceedingly low for cases brought as class actions.

See In re Holocaust Victim Assets Litigation, 105 F.Supp.2d 139 (E.D.N.Y.2000) (finding settlement agreement that provided for attorneys fees capped at 1.8% to be fair and reasonable); Eizenstat Decl. ¶ 19; Statement of Interest, at 23. As all claims of attorneys for fees must go to an arbitrator, no individual attorney have assurances of what they will receive; only that it will be proportionately much less than 1.25% of the total settlement set aside for all attorneys. *See Magana,* 74 F.R.D. at 72 ("Control of Plaintiff's Counsel's Attorney's Fee as Primary Means of Preventing Rule 23 Abuse"). Noting also that these fees were only negotiated after compensation for the entire class had been agreed upon, Whinston Decl. ¶ 4; Ratner Decl. ¶ 14, and that they will be paid out of a separate fund, Eizenstat Decl. ¶ 19, it strikes the Court as entirely improbable that the fees for Plaintiffs' attorneys were ***445** the motivating factor behind the entire agreement.

Since notice in these cases was clearly not required to prevent the collusive abuse of Rule 23, the only matter left for the Court to determine is whether dismissal of the named Plaintiffs' claims without notice would prejudice members of the absent class. Because the settlement came prior to the certification of class claims, legal prejudice could not attach to the putative class members, who are not bound by the dismissal of the individual claims with prejudice. *Diaz,* 876 F.2d at 1408. In these cases, legal prejudice will attach to the putative class members only after they have collected from the

Foundation, for at that point they will be asked to sign waivers, taking away their right to sue German Industry. Statement of Interest, at 23; Foundation Law § 16(2).

Putative class members may also be prejudiced where an action upon which they relied for recovery is terminated without their knowledge. *Diaz,* 876 F.2d at 1408. Prejudice can also result if a rapidly approaching statute of limitations precludes an adequate time for plaintiffs to file their complaints. *Id.*

The *Shelton* court noted that since no notice is required to purported class members when an action is initially filed, any reliance on the part of putative class members must arise as a consequence of media coverage or some other secondary information. 582 F.2d at 1315. Courts will typically find reliance by putative class members only in those cases that generate media coverage. *Id.* Reliance will also be limited to those individuals who are legally savvy enough to appreciate the legal implications of a purported class action on their private rights of action. *Id.* A court should consider the relevant facts and circumstances of a particular case when examining whether the speculative reliance interest of absent putative class members is sufficiently important to necessitate class notice. *Shelton* at 1315 (noting that the courts in *Berse v. Berman,* 60 F.R.D. 414-417 (S.D.N.Y.1973); and *Elias v. National Car Rental System, Inc.,* 59 F.R.D. 276, 277 (D.Minn.1973), followed this practice).

After a review of the materials presented to it, the Court has found that any reliance by absent putative class members is speculative and negligible at best, and is not sufficiently important to necessitate class notice. While the media coverage surrounding the existence of these cases might have been sufficient to create a reliance interest, more recent media coverage has repeatedly stated that implementation of the Foundation is expressly contingent on the termination of all rights of action in the courts of the United States. See Ratner Decl. ¶¶ 2-11; See *Pennsylvania Nurses Assoc.*, 1987 WL 109018, at *2.

The Court concludes that any putative class member legally savvy enough to appreciate the impact of a pending putative class action on their rights would similarly appreciate the impact of the termination of all actions pending in the United States on their rights. The court is not concerned that such individuals will fail to become aware of information about the settlement, as any putative class members who may have come to rely on these cases will almost certainly be touched by some facet of the extensive publicity programs that are presently being put into effect. Eizenstat Decl. ¶ 24; 2nd Neuborne Decl. ¶ 13; Statement of Interest at 22-23.

The concerns about the expiration of a statute of limitations articulated in the Diaz decision are also of minimal concern here, as all of the cases stem from alleged conduct that occurred more than 55 years ago. *See Diaz*, 876 F.2d at 1411 (notice held to

be required as there was little time left between dismissal of the putative class and the expiration of the statute of limitations); *cf. American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) (holding that the filing of a class action tolls the statute of limitations on all individual claims covered by the class).

Without reaching or commenting upon the merits of any claims that could be brought by putative class members, the Court notes that any putative class members who wish to pursue legal action could face a serious up-hill battle en route to recovery, in light of the decisions in *In re Holocaust Victim Assets Litigation,* 105 F.Supp.2d 139, ***446** *Burger- Fischer*, 65 F.Supp.2d 248, *Iwanowa*, 67 F.Supp.2d 424, and the unpublished decision in *Josef Tiber Deutsch, et al. v. Turner Corp., et al.,* CV 00-4405 SVW (C.D.Cal.2000). That the United States is required by the Executive Agreement to file a Statement of Interest in support of dismissal in any new case that may be brought could also make recovery more difficult. Eizenstat Decl. ¶ 14; Executive Agreement, Art. 2 & Annex B.

Potential Plaintiffs would likely have to prove to a court's satisfaction that the applicable statutes of limitations did not run decades ago. While there may exist the prospect of some additional delay to those Plaintiffs because notice has not been directly provided to them, it is the opinion of the Court that it will not result in prejudice sufficient to justify the

requirement of notice, especially given the real prejudice that would result if notice were compelled.

Not only have courts declined to require notice in a pre-certification class action where the facts fail to show that prejudice would result from a lack of notice, *Robinson v. First National City Bank*, 482 F.Supp. 92, 100 (S.D.N.Y.1979); *Jaen v. New York Telephone Co.*, 81 F.R.D. 696 (S.D.N.Y.1979), but as previously discussed, in Simer, the Seventh Circuit held that the "absolute application of Rule 23(e) and the reasoning behind such an absolute rule may prove too much, often at the expense of other important individual and institutional policies." 582 F.2d at 665; See also Robinson, 482 F.Supp. at 100 (declining to require notice where cost of providing notice would prove more prejudicial than absence of it). The cases before the Court have presented just such a circumstance, where the delay of dismissal pending imposition of notice would have directly resulted in prejudice to the putative class.

This prejudice partially stems from the fact that no one in the putative class can recover from the Foundation until ALL pending claims in the courts of the United States have been dismissed with prejudice. See Chrobog Letter, at 3. Members of the putative class would benefit more from the expeditious dismissal of all pending actions so that they can recover than they would from any delay so that additional notice can be implemented. The prospect of this delay is particularly unconscionable when one considers that members of the putative

class are aged and dying. See In re Austrian and German Bank Holocaust Litigation, 80 F.Supp.2d at 172; Joint Statement ¶ 2. As all of the claims stem from wrongs which were committed 55 years ago, more delay for the implementation of notice provisions which would be of questionable value is unacceptable to the Court.

Notice would also be unduly burdensome because of the great cost of notice to plaintiffs. The putative class numbers in the millions, is located on several continents, and speaks a multitude of languages. Asking named Plaintiffs to pay for even rudimentary notice by publication in these countries would require them to incur great cost. Such provisions would also be completely redundant, given that the Foundation has launched an unprecedented publicity program to make the right of recovery from the Foundation known.

As courts have previously dispensed with notice in circumstances where the difficulties and expense of pre-certification notice outweigh the slight risk of harm to the putative class, See *Sikes v. AT & T, 841 F.Supp.* 1572, 1579 (S.D.Ga.1993), the Court has found no reason not to allow voluntary dismissal with prejudice and without notice in the present cases. Given the fact that the imposition of notice would be injurious to the very putative class whose interests the Court must protect, the Court declines to order notice, as the inherent delay would work a final injustice to a great many members of that putative class.

D. Rule 60(b)

Finally, of great concern to Plaintiffs in these actions is the prospect that full funding of the Foundation might never be achieved, and that as a result they would have dismissed their claims with prejudice for nothing. McCallion/Realuyo Decl. ¶ 4; 2nd Neuborne Decl. ¶ 15 n.5. The Court shares this understandable concern, and for this reason all of the Orders of Dismissal (with the consent of the parties) were made expressly subject to *447 Federal Rule of Civil Procedure 60(b). Rule 60(b) provides that a court may relieve a party from a final judgment or order for circumstances such as fraud, mistake, misrepresentation, or any other such reason justifying relief from the operation of the judgment or order. Fed.R.Civ.P. 60(b).

Pursuant to Rule 60(b), should the Foundation not achieve full funding, Rule 60(b) would provide the Plaintiffs who have dismissed with prejudice their complaints in reliance on full funding with an avenue for relief. Given the commitment to the Foundation by the Federal Republic of Germany and by German Industry, many companies of which were not in existence during the Nazi era, an application under F.R.C.P. 60(b) is most unlikely.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motions to voluntarily dismiss their actions with prejudice have been **granted.** Appropriate Orders have previously

been entered in those cases listed in Appendix A to this opinion.

The historical significance of the resolution of these cases invites the Court to make the following personal observations:

Reading the allegations in the Complaints and the Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation "Remembrance, Responsibility and the Future," the Court is reminded of Kierkegaard's observation that "[l]ife can only be understood backwards but it must be lived forwards."

The allegations in the Complaints personalize the belief of Omer Bartov that "the Holocaust is indeed a crucial event for Western civilization, and that however much we learn about other instances of inhumanity, we cannot avoid the fact that this genocide, in the heart of our civilization, perpetrated by one of its most important nations (with the collaboration or complicity of many others), can never be relegated to a secondary place." Omer Bartov, *Mirrors of Destruction, War, Genocide and Modern Identity 6* (Oxford Univ. Press 2000).

As Bartov observes, "[t]he carnage and genocide of World War II that followed did more than shatter the dreams of military and national greatness, it dealt a lethal blow to the very idea of shared humanity. Half a century later we are still groping

for a way to come to terms with the belated effects of this trauma, even as it's last witnesses are leaving the stage." *Id.* at 45.

While the Complaints and Bartov's comments look to the past, the Joint Statement looks to the past and the future. This historic document is signed not only by the parties to the litigation but by the Republic of Belarus, The Czech Republic, the State of Israel, the Republic of Poland, the Russian Federation, and Ukraine, together with the Government of the United States of America and the Federal Republic of Germany as well as the Conference on Jewish Material Claims against Germany.

The Joint Statement acknowledges "the intention of both the Government of the Federal Republic of Germany and German companies to accept moral and historical responsibility arising from the use of slave laborers, and from property damage suffered as a consequence of racial persecution and from other injustices of the National Socialist era and World War II," and notes "with appreciation the December 17, 1999, statement of the President of the Federal Republic of Germany paying tribute to those who were subjected to slave and forced labor under German rule, recognizing their suffering and the injustices done to them, and begging forgiveness in the name of the German people." Statement of Interest, at 2.

In formulating the framework for the Foundation "Remembrance, Responsibility and the Future," the

participants have provided a mechanism for payments to hundreds of thousands of slave and forced laborers, following the initiative of German companies to establish a foundation, which has since been joined by thousands of other German companies. But within the Foundation itself is a "Remembrance and Future Fund" charged with the permanent task "to foster projects that serve the purposes of better understanding among peoples, the interests of survivors of the National Socialist regime, youth, exchange, social justice, remembrance of the threat posed by totalitarian systems *448 and despotism, and international cooperation in humanitarian endeavors." Foundation Law § 2(2). It is this commitment that grounds our confidence in Kierkegaard's words, that "life must be lived forwards."

Appendix A

The following cases have all been voluntarily dismissed with prejudice. Cases are organized by D.N.J. Docket No. If applicable, the districts of origin for cases commenced outside the District of New Jersey are indicated. Cases marked with (*) were commenced as individual actions; the remainder were commenced as putative class actions. This opinion is applicable to all those cases listed below:

This opinion is applicable to all those cases listed bel ow:

98-4104 ELLY GROSS, ET AL. V. VOLKSWAGEN AG

98-4280 ELIZABETH HIRSCH, ET AL. V. FRIED KRUPP AG, ET AL.

98-4299 ERNA ANOLIK, ET AL. V. FRIED KRUPP AG, ET AL.

98-4397 CHAJE GROSZ V. AEG AKTIENGESELLSCHAFT, ET AL.

98-4428 JULEAN JACOBOWITZ, ET AL. V. RHEINMETALL AG

98-4429 EMANUEL ROSENFELD V. VOLKSWAGEN, AG

98-4542 MALKA KOHN V. DIEHL GMBH & CO.

98-5247 WILMOS SPITZER, ET AL. V. BAYERISCHE MOTOREN WERKE AG

98-5248 RAHAM GLUCK V. AGFA-GEVAERT AG

98-5671 MARK STERN, ET AL. V. HEINKEL HOLDING GMBH

99-385 ELIZABETH GREENSPAN V. DYNAMIT NOBEL AKTIENGESELLSCHAFT

99-392 MARIAN SOLARCZYK V. BAYER AG, ET AL.

99-418 IRVING KEMPLER, ET AL. V. DAIMLER/CHRYSLER AG

99-756 ISAAC NITTENBERG, ET AL. V. BAYERISCHE MOTOREN WERKE AG, ET AL.

99-1892 JOSEF HIRSZ ROZENBERG, ET AL. V. CONTINENTAL AG

99-2210 ALEX FEUER, ET AL. V. BAYER AG; HOECHST AG

99-2228 FELIX OPATOWSKI, ET AL. V. ADAM OPEL AG, ET AL.

99-2229 GILBERT MICHELIN V. ADAM OPEL AG, ET AL.

99-2270 VERA GROSSMAN KRIEGEL, ET AL. V. BAYER AG; HOECHST AG

99-3964 VALENTIN SUVAROV, ET AL. V. FEDERAL REPUBLIC OF GERMANY

00-3881 SOPHIE STAHL, ET AL. V. VICTORIA HOLDING AG (C.D.Cal.98-3490)

00-3882 SIMON WIESENTHAL CENTER, ET AL. V. DEUTSCHE BANK, AG (N.D.Cal.99-2503)

00-3883 [FN‡]EVA MOZES KOR V. BAYER AG (S.D.Ind.99-36)

00-3884 [FN†] HELENE POLLACK, ET AL. V. SIEMENS AG, ET AL. (E.D.N .Y. 98-5199)

00-3885 PIRI KATZ, ET AL. V. WURTTEMBERGISCHE METALLWARENFABRIK AG (E.D.N.Y.98-6054)

00-3886 JACK BRESSLER, ET AL. V. PHILLIP HOLZMANN AG (E.D.N.Y.98-6335)

00-3887 BERNARD BLAU, ET AL. V. FORD MOTOR CO., (E.D.N.Y.99-316)

00-3888 EUGENE LICHTAG, ET AL. V. FRIED KRUPP AG, ET AL. (E.D.N.Y.99-2122)

00-3889 HELEN HONZATKO, ET AL. V. VOLKSWAGEN AG (E.D.N.Y.99-2124)

00-3890 HONORATA CHMIELEWSKA V. SIEMENS AG (E.D.N.Y.99-2238)

00-3891 ANTONI KOZIARSKI, ET AL. V. DAIMLER/CHRYSLER AG (E.D.N.Y.99-2240)

00-3892 DENESNE POLGAR, ET AL. V. DAIMLER/CHRYSLER AG (E.D.N.Y.99-2527)

00-3893 GYULANE HARMAT, ET AL. V. SIEMENS AG (E.D.N.Y.99-2528)

00-3894 VERA DELAKOWSKI, ET AL. V. FEDERAL REPUBLIC OF GERMANY (E.D.N.Y.99-6375)

00-3895 MOSES MANDELBAUM V. MESSERSCHMITT-BOELKOW-BLOHM GMBH, ET AL. (S.D.N.Y.98-7834)

00-3895 ISRAEL SPITZER V. PHILIP HOLZMANN AG (S.D.N.Y.99-3285)

00-3897 ANNA SNOPCZYK V. VOLKSWAGEN AG E.D. Wis. 99-472)

00-4470 MICHAELS V. ALLIANZ LEBENS VERSICHERUN (N.D.Cal.99-2113)

00-4471 RYSZARD STANISZEWSKI V. BAYER AG, ET AL. (N.D.Cal.99-4938)

00-4472 SAVAS KARDIASMENOS V. BAYER AG, ET AL (D.Md.99-1955)

00-4473 EDWARDS V. SIEMENS AG (E.D.N.Y.00-4473)

00-4474 GUMINSKY, ET AL. V. BAYERISCHE MOTOREN WERKE AG, ET AL. (E .D.N.Y. 00-4474)

00-4475 TATIANA ALEKSANDROVNA ZAITSEVA, ET AL. V. SIEMENS AG, ET AL. (S.D.N.Y.99-4318)

00-4476 NADIA MATVIIVNA VYDRYGAN, ET AL. V. COMMERZBANK AG (S.D.N.Y.00-1287)

00-5494 FISCHER, ET AL. v. STEYR-DAIMLER-PUCH AG, ET AL. (C.D.Cal.00-8619)

00-5495 GIVON V. AXA NORDSTERN SERVICE INT. (U.S.), INC., ET AL. (C.D.Cal.00-8345)

00-5497 ‡KRILL, ET AL. V. REPUBLIC OF AUSTRIA (D.D.C.00-1976)

00-5498 ‡ GUTWILLIG V. STEYR-DAIMLER-PUCH AG, ET AL. (E.D.N.Y.98-6336)

00-5499 GIVON V. AXA NORDSTERN ART INSURANCE CORP., ET AL.(C.D.Cal.00-9080)

FN† In this action, all named Plaintiffs but Mr. Tibor Eisen have voluntarilydismissed their claims with prejudice.

FN‡ In these two actions, remaining claims against non-German defendants have been transferred back to the courts of origin.

***449 Appendix B**

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D.N.J.,2000.
In re Nazi Era Cases Against German Defendants Litigation 198 F.R.D. 429

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• 2004 WL 3686449 (Trial Motion, Memorandum and Affidavit) Defendants' Reply Memorandum of Law in Response to the Court's January 22, 2004 Letter Requesting Additional Briefing on Personal Jurisdiction (May 10, 2004)
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D.N.J.,2006.
Jul 06, 2006
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United States District Court,
D. New Jersey.
In re NAZI ERA CASES AGAINST GERMAN DEFENDANTS LITIGATION.
This Matter Relates To:
Ronald Mandowsky et al., Plaintiffs,
v.
Dresdner Bank AG, Defendant.
MDL. NO. 1337.
D.N.J.Lead Civ. 98-4(WGB).
Civ. No. 00-4986 (WGB).
July 6, 2006.

Background: In action alleging that German bank confiscated property as agent of the Nazi government, heirs of property owner moved to set aside their prior stipulation of dismissal.

Holding: The District Court, Bassler, Senior District Judge, held that reopening of prior action was not warranted.

Motion denied.

West Headnotes

[1] Federal Civil Procedure 170A

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2641 k. In General. Most Cited Cases

General purpose of Federal Rule of Civil Procedure governing motions for relief from final judgment is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[2] Federal Civil Procedure 170A

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2641 k. In General. Most Cited Cases

Relief pursuant to Federal Rule of Civil Procedure governing motions for relief from final judgment is available only under such extraordinary circumstances that the overriding interest in the finality and repose of judgments may properly be overcome. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[3] Federal Civil Procedure 170A

170A Federal Civil Procedure
170AXI Dismissal
170AXI(A) Voluntary Dismissal
170Ak1715 k. Vacation. Most Cited Cases

Fact that heirs of man whose property was confiscated in Nazi Germany, after relying on expert's advice to seek compensation from foundation set up to award relief to such victims, voluntarily dismissed their action against bank that acted as Nazi agent, did not make decision to dismiss involuntary, as would warrant grant of their motion to set aside that dismissal, even though heirs were denied compensation by the foundation; heirs made a free, calculated, and deliberate choice to dismiss their action in favor of the administrative proceedings. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

[4] Federal Civil Procedure 170A

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2651.1 k. In General. Most Cited Cases

Motions for relief under Federal Rule of Civil Procedure governing motions for relief from final judgment are not to be granted unless the movant can demonstrate a meritorious claim or defense. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

[5] Federal Civil Procedure 170A

170A Federal Civil Procedure
170AXI Dismissal
170AXI(A) Voluntary Dismissal
170Ak1715 k. Vacation. Most Cited Cases

Reopening, of action brought by heirs of man whose property was confiscated by bank in Nazi Germany, would be futile, and thus heirs' motion to set aside their voluntary dismissal of their action would be denied; case presented a nonjusticiable political question and international comity concerns, since German courts had made decisions in the matter and U.S. government had expressed its view that the action would interfere with the success of the foundation set up to handle such claims. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[6] International Law 221

221 International Law
221k10.8 Domestic Effect of Foreign Acts and Laws
221k10.9 k. In General. Most Cited Cases
Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory; redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

[7] Federal Civil Procedure 170A

170A Federal Civil Procedure
170AXI Dismissal
170AXI(A) Voluntary Dismissal
170Ak1715 k. Vacation. Most Cited Cases

Public policy interests weighed in favor of denying motion to set aside prior voluntary dismissal, by heirs of man whose property was confiscated by bank in Nazi Germany, of their action against that bank; dismissal would undermine the "legal peace" resulting from creation of a foundation to handle such claims by allowing heirs to relitigate their claims after voluntarily choosing to bring them to the foundation. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

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William M. Barron, Esq., ALSTON & BIRD LLP, New York City, Thomas R. Valen, Esq., Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., Newark, NJ, for Defendant.

OPINION

BASSLER, Senior District Judge.

Plaintiffs Ronald Mandowsky and Seth Feldman (collectively as "Plaintiffs") move to set aside their December 19, 2000 Stipulation of Dismissal with Prejudice. Plaintiffs brought this action for compensation for property allegedly confiscated by defendant Dresdner Bank Aktiengesellschaft ("Dresdner Bank") as an agent of Nazi Germany. The property was located in what was formerly East Germany.

I. BACKGROUND

A. The Nacher Family Claims

Plaintiffs are the grandnephews and great-grandnephews of Ferdinand Nacher and Ignatz Nacher, respectively. Plaintiffs, as the heirs of Ferdinand and Ignatz, purport to be the rightful owners of property stolen by Dresdner Bank from their great-uncle Ignatz and now demand restitution. In 1934, Dresdner Bank, as affiliated with Nazi Germany, allegedly seized at gunpoint the majority stock certificates in Engelhardt Breweries from Ignatz Nacher, President of Engelhardt. (*See* Kerson Affidavit Ex. I, Original Complaint at ¶ 6; Ferdinand Nacher Affidavit (attached to Plaintiffs' Reply Memorandum) at ¶ 1.) Ignatz developed Engelhardt from its humble beginnings into a major brewery. (*See* William Barron Declaration, Ex. 3, Translation of the January 8, 1993 Berlin Court Decision at 3.) [FN1] After stealing his stock holdings, the Nazis deported Ignatz to Switzerland where he died in 1939. (Ferdinand Nacher Affidavit at ¶ 2; Kerson Affidavit Ex. A, May 25, 2004 International Organization for Migration Decision ("IOM Decision") at ¶ 3.) Soon thereafter, Ferdinand Nacher, Ignatz's nephew and vice-president of Englehardt, fled to Belgium. (*Id.* at ¶ 5.) Ferdinand made his way to the United States, served in the Army from 1943-1945 and became a citizen. (*Id.*) In 1956, Ferdinand was appointed Executor of Ignatz Nacher's estate. (Kerson Affidavit ***233** Ex. I, Original Complaint at ¶ 4.) From that date,

Ferdinand pursued claims to Ignatz's stolen property in the courts of Germany and the United States. (*Id.*)

> FN1. Dresdner Bank submitted the William Barron Declaration as part of its original Motion to Dismiss on October 6, 2000.

Ferdinand, represented by counsel at the time, settled a portion of the claims to the Nacher family property with Dresdner Bank in a West Berlin Court in 1956. (Plaintiffs' Reply Br. at 3; William Barron Declaration, Ex. 5, Translation of the December 18, 1956 Settlement Agreement at 21.) The 1956 settlement agreement provided that "all claims of ... the Ignatz Nacher estate, on the one hand, and the Dresdner Bank ..., on the other hand, are settled. Thus, not only are the principal claims settled, but also any entitlements to compensation and subsidiary claims that might somehow arise." (William Barron Declaration, Ex. 5, Translation of the December 18, 1956 Settlement Agreement at 5.)

Notwithstanding the 1956 settlement agreement, in 1990 Ferdinand Nacher filed a petition for restitution against Dresdner Bank in the Berlin District Court. The Berlin Court declared that the 1956 settlement "materialized effectively," and contrary to Ferdinand Nacher's allegations of deceit, the hearing "was not infringed upon." (William Barron Declaration, Ex. 3, Translation of the January 8, 1993 Berlin Court Decision at 19, 21.) The Court observed:

Insofar as [Ferdinand Nacher as the third party petitioner] lays claims to the purchase prices for the interests transferred, as well as the company properties transferred and the vehicle fleet ..., it should be noted that his right as executor goes no further than that of the decedent [Ignatz Nacher]. [Ignatz Nacher] was owner of neither the Engelhardt-Brauerei AG nor the Groterjahn-Brauerei AG and the land and fleets belonging thereto, nor the other breweries set forth in the demand.... As a major stockholder of a corporation and as its chairman of the supervisory board he could steer the purchase and sale of breweries and real estate. But the profits from the sales didn't accrue to him, but rather the company represented by him. The profits came to him only through dividends. It operates the same for [Ferdinand Nacher as the third party petitioner] and the heirs represented by him with respect to the Engelhardt-Brauerei shares reimbursed to them in the settlement. He/they are not entitled to claims against the company for reasons of business politics.

A cancellation of the basis of a transaction, which could have the consequence that the settlement would have to adapt to the new conditions, did not take place. The possessions of the Engelhardt-Brauerei did not abruptly increase through the reunification of Germany. The third party petitioner himself doesn't state that parcels of land of the Engelhardt-Brauerei AG were dispossessed in East Berlin.

(*Id.* at 25.)

On January 8, 1993, the Court denied Ferdinand Nacher's claims for restitution "insofar as they overstep[ped] the settlements arrived at on December 18, 1954." (*Id.* at 2.)

On April 13, 1994, Ferdinand filed a complaint against Dresdner Bank, as a foreign bank authorized to do business in New York, in the Supreme Court of New York demanding damages of $25 billion ($25,000,000,000.00). (Kerson Affidavit Ex. I, Original Complaint at ¶¶ 2, 4.) Ferdinand Nacher died in November 1996, naming his grandnephews, Plaintiffs, to continue in his place as co-executors of his estate. (Kerson Affidavit Ex. G, Last Will and Testament of Ferdinand Nacher at ¶¶ 3, 6.)

On August 15, 2000, Dresdner Bank removed the lawsuit to the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §§ 1331 and 1441. Dresdner Bank argued that the case became removable when the Governments of the United States and the Federal Republic of Germany entered into an Executive Agreement on July 17, 2000, pursuant to which Germany and German Industry created a Foundation, discussed *infra,* entitled "Remembrance, Responsibility and the Future" (the "Foundation"). (*See* Reply Declaration of William Barron, Ex. A, Dresdner ***234** Bank's Notice of Removal at ¶¶ 6, 7.) [FN2] Specifically, Dresdner Bank averred that the Executive Agreement enmeshed the Plaintiffs' claims with a substantial question of federal law. (*Id.* at ¶¶ 8-10.) The suit was then transferred here by order of the Multidistrict Litigation Panel and consolidated amongst approximately fifty similar

cases "so that the Court could consider the impact of the German Foundation 'Remembrance Responsibility and the Future' " on the many civil suits being pursued in U.S. courts by Holocaust victims. *In re Nazi Era Cases Against German Defendants Litigation,* 213 F.Supp.2d 439, 442 (D.N.J.2002); *see Multidistrict Litigation Panel Transfer Order,* Docket No. 1337, 2000 U.S. Dist. LEXIS 11650 (August 4, 2000).

FN2. Submitted as part of Defendant's Reply to its Motion to Dismiss, *see supra* note 1.

B. The Creation of the Foundation

The Foundation, examined at length in *In re Nazi Era Cases Against German Defendants Litigation,* was the result of an international effort led by Germany, the United States, and Israel to efficiently resolve the highly sensitive and numerous "claims for restitution and compensation arising out of the Holocaust." *See* 198 F.R.D. at 431-35 (internal citations omitted). As part of the extensive and historic negotiations that took place, it was agreed that in exchange for the creation of a 10 billion Deutsche Mark fund supporting the Foundation by the German Government and German industries, *id.* at 432- 33, plaintiffs with pending lawsuits in the United States "promised dismissal with prejudice of all Holocaust-related litigation against German defendants pending in American courts (referred to as 'legal peace' by the parties)...." 213 F.Supp.2d at 443; *see also* 198 F.R.D. at 430. The Foundation promised to provide Holocaust-era victims, or their

heirs, with a "non-bureaucratic [and] non-adversarial" alternative means for recovery. 198 F.R.D. at 433.

On August 12, 2000, Germany promulgated the law creating the Foundation as a legal entity with the purpose of "respond[ing] to the moral responsibility of German business arising from the use of forced laborers and from damage to property caused by persecution, and from all other wrongs suffered during the National Socialist era and World War II." (Kerson Affidavit, Exhibit E, Executive Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation, "Remembrance, Responsibility and the Future" at 2); *id.* at 432. The newly formed Foundation law provided that "[e]ligible claimants [would be] either those who personally were victims, or the heirs of victims who died after February 16, 1999." *Id.* at 433 (citing *Gesetz Zur Errichtung Einer Stiftung "Erinnerung; Verantwortung und Zukunft"* Translated as "Law of the Creation of a Foundation 'Remembrance, Responsibility and Future' " at § 13). Those eligible would be entitled to different amounts of recovery depending on the harm they or their family members endured. *Id.*

Overwhelmingly, the plaintiffs in U.S. courts sought voluntary dismissal with prejudice, examined in the Court's December 5, 2000 opinion, to pursue their claims with the Foundation.

C. Dismissal of Plaintiffs' Claims in the United States and the Subsequent Decisions by the Foundation

On October 10, 2000, Dresdner Bank filed a motion to dismiss Plaintiffs' complaint based on, *inter alia,* the political question doctrine, comity and the doctrine of *res judicata.* Plaintiffs responded on October 25, 2000 with a cross-motion to remand the suit to the New York state courts. Plaintiffs argued that "[they] were especially careful not to state any federal questions whatsoever in the initial State Court Summons and Complaint [because] Plaintiffs fully anticipated that [Dresdner Bank] would wrongfully enlist the United States Government on its side." (Plaintiffs' Memorandum of Law in Support of Their Motion for Remand to the State Court and in Opposition to Defendant's Motion to Dismiss at 22.) They urged the Court to ignore the 1993 Berlin Court decision and deny Dresdner Bank's motion to dismiss.

***235** The Court held oral argument on November 13, 2000. On December 19, 2000, prior to the Court reaching its decision on the parties' cross-motions, Plaintiffs voluntarily dismissed this action and pursued their claims via the newly established Foundation. [FN3] Plaintiffs presented their claims for Ignatz Nacher's stolen shares of Engelhardt Breweries to the International Organization for Migration ("IOM"), one of several partner organizations to the Foundation handling "actual collection and processing of applications, and the distribution of payments." [FN4] 198 F.R.D. at 433 &

n. 12. The IOM twice rejected Plaintiffs' claims. (Kerson Affidavit at ¶ 2.) In its first decision, on May 25, 2004, the IOM determined that the relationships between the Ignatz Nacher and the persons bringing the claims did not meet the Foundation's eligibility criteria. [FN5] (*See* Kerson Affidavit, Exhibit A, May 25, 2004 IOM Decision at 3.) The IOM further provided:

> FN3. In March 2002, Plaintiffs and other similarly situated parties, filed a Motion to Enforce Settlement and for Declaratory Relief. "In the most general terms, Plaintiffs allege[d] that German Industry [had] failed to meet its obligations to make appropriate interest payments to the Foundation. Accordingly, Plaintiffs ... asked the Court to interpret the parties' rights and obligations under the German Foundation law, and ... asked the Court to order German Industry to make additional payments to the Foundation ... pursuant to Fed.R.Civ.P. 60(b)." 213 F.Supp.2d at 442. On July 23, 2002, the Court denied their motion because "[it] did not retain jurisdiction to enforce settlement in [the] disputes ... [and because] the narrow post-dismissal avenue of relief left open pursuant to Rule 60(b) [did] not give the Court the authority to issue the declaratory orders that Plaintiffs [sought]." *Id.* at 447-48. The Court noted that "*it will not entertain any independent actions directed to the conduct of the Foundation ... the Court is absolutely certain that matters pertaining to the*

operation of the Foundation are beyond the purview of American courts, and must be resolved via existing mechanisms in
Germany." Id. at 447 n. 11 (emphasis added).

FN4. Paragraph 6 of Annex A to the Executive Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation, "Remembrance, Responsibility and the Future," provides:
The Foundation legislation will provide that persons who suffered loss of or damage to property during the National Socialist era as a result of racial persecution directly caused by German companies are eligible to recover under the payment system set forth in paragraph 11.

Paragraph 11 of Annex A provides:

The Foundation legislation will establish a three-member committee for property matters (paragraph 6 and 7) ... The Committee will not have the authority to reopen any case that has been finally decided by a German court or administrative body, or that could have been decided by application in time.

FN5. The International Migration Organization provided the following definition under Eligibility:

> According to Section 13(1) of the German Foundation Act and Section 3(1) of the Supplemental Rules, a claim may be made by the individual who suffered
>
> the property loss. If the individual is no longer alive, the surviving spouse and children are entitled to equal shares of the award. If the eligible person left neither a spouse nor children, awards may be applied for in equal shares by the grandchildren, or if there are no grandchildren living, by the siblings. If none of the above files a claim, then a claim may be filed by the persons named as heirs in the sufferer's will; those who are heirs according to national law or based on a court decision (but not according to a will) are not eligible.
>
> (Kerson Affidavit, Exhibit A, May 25, 2004 International Organization for Migration Decision at 3.)

A. The German Foundation Act was enacted to compensate, among other things, property losses that were caused in connection with the essential, direct, and harm-causing participation of a German enterprise. It was not created to give a second opportunity to those who could and/or should have participated in prior German compensation

programs.... Those who were eligible to participate in one of those programs are specifically excluded by the German Foundation Act from receiving compensation under the current program, regardless of whether or not they did make a claim.

The Claimant has or had his/her domicile or permanent residence in the Federal Republic of Germany or in a country whose government has had diplomatic relations with the Federal Republic of Germany. Therefore, the Claimant could have already filed a claim in one of the prior German compensation programs.

The Commission must therefore deny the Claim for compensation for the property loss(es) referenced above.

*236 A. The Claimant did not submit documentation indicating that the property loss(es) ... was/were caused in connection with the essential, direct, and harm-causing participation of a German enterprise.

. . . . .

Although the Claimant alleges in the Claim File that the property loss(es) referenced above was/were suffered with the essential, direct and harm-causing participation of a German enterprise, there is no proof whatsoever of German enterprise involvement. The Commission finds that despite the application of a relaxed standard of proof, and in light of the time and place of loss and the nature of the property that

was lost, the Claimant has not credibly demonstrated that the property loss(es) referenced above was/were caused in connection with the essential, direct and harm-causing participation of a German enterprise. The Commission must therefore deny the Claim for compensation for the loss(es)....

(Id. at 4-5 (internal citations omitted).)

On August 24, 2004, Plaintiffs filed a Request for Reconsideration challenging the eligibility requirements and for manifest error. (See Kerson Affidavit, Exhibit B, July 18, 2005 IOM Decision at 1, 3.) Plaintiffs argued "that the loss inflicted occurred due to a major role played directly by a German company, namely Dresdner Bank and ... no compensation has neither been paid to date nor could have been paid for the loss." (Id. at 3.) On July 18, 2005, the IOM affirmed its initial decision. *(Id.)*

D. Revival of Plaintiffs' Claims in this Court

Plaintiffs reappear in this Court to set aside their December 19, 2000 Stipulation of Dismissal with Prejudice pursuant to Fed.R.Civ.P. 60(b). The motion is premised upon the Court's concern, expressed in In re Nazi Era Cases Against German Defendants Litigation, 198 F.R.D. 429 (D.N.J.2000), that the Plaintiffs in the consolidated cases could have been left with no avenue for relief absent sufficient funding of the foundation established to provide compensation to the surviving victims of Nazi-era offenses. Id. at 446-47. Plaintiffs ask that this Court

"vacate the IOM decision as it applies to the Nacher Family, and ... set a firm date for the trial" and "to set aside the IOM's erroneous findings." (Kerson Affidavit at ¶ 19; Mandowsky Affidavit at ¶ ¶ 7, 9.)

II. DISCUSSION

Rule 60(b) empowers courts to relieve a party from final judgment for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ...; (3) fraud ..., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b).

[1][2] The Third Circuit held in Coltec Industries, Inc. v. Hobgood, that "[t]he general purpose of Rule 60(b) ... is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." 280 F.3d 262, 271 (3d Cir.2002) (citing Boughner v. Sec'y of Health, Educ. & Welfare, 572 F.2d 976, 977 (3d Cir.1978)). Relief pursuant to Rule 60(b) is available to the movant "only under such circumstances that the 'overriding interest in the finality and repose of judgments may properly be overcome.' " Harris v.

Martin, 834 F.2d 361, 364 (3d Cir.1987) (quoting Martinez-McBean v. Gov't of the Virgin Islands, 562 F.2d 908, 913 (3d Cir.1977)). "The remedy provided by Rule 60(b) is extraordinary, and only special circumstances may justify granting relief under it." *Tischio v. Bontex, Inc.,* 16 F.Supp.2d 511, 533 (D.N.J.1998) (quoting *Moolenaar v. Government of Virgin Islands,* 822 F.2d 1342, 1346 (3d Cir.1987)). Accordingly, "[m]otions under Rule 60(b) may not generally substitute for an appeal." *Harris,* 834 F.2d at 364 (quoting ***237** *Marshall v. Bd. of Ed. Bergenfield, NJ,* 575 F.2d 417, 424 (3d Cir.1978)). Rule 60(b) is not a vehicle to revisit an unsatisfying ruling, it "may only be granted under extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Sawka v. Healtheast, Inc.,* 989 F.2d 138, 140 (3d Cir.1993). "[W]hen, as in this case, the [movants] made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment, their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost." *United States Steel Corp. v. Fraternal Asso. of Steel Haulers,* 601 F.2d 1269, *1274 (3d* Cir.1979).

Plaintiffs' motion must be denied for three reasons: (1) Rule 60(b) is not designed to release a litigant of a freely chosen litigation strategy, (2) Rule 60(b) is not available when granting relief would ultimately prove futile, and (3) for broader public interests.

A. Plaintiffs Exercised Their Free, Calculated, and Deliberate Choice to Voluntarily Dismiss With Prejudice

[3] Seeking restoration of their cause of action under Rule 60(b)(6), Plaintiffs maintain that "[t]he clear intention [of the Foundation] was to provide a mechanism for awarding compensation to the Nacher Family. That was, is and remains a primary goal of the Governments of the United States and Germany that set up the Foundation to begin with." (Plaintiffs' Reply Memorandum at 2-3.) Plaintiffs contend that the Foundation failed because it did not recompense the Nacher family and, therefore, their voluntary dismissal "must be found to be involuntary in all respects [and it] must be vacated." (Id. at 7, 13.)

In *In re Nazi Era Cases Against German Defendants Litigation,* the Court explicitly stated its concern "that *full funding of the Foundation* might never be achieved ... *and for [that] reason all of the* Orders of Dismissal (with the consent of the parties) were made expressly subject to Federal Rule of Civil Procedure 60(b)." 198 F.R.D. at 447-48 (emphasis added). Contrary to Plaintiffs' belief, the revival of their voluntarily dismissed action pursuant to the Court's Rule 60(b) power is not triggered by their inability to obtain relief through the Foundation. Rather, the possibility of relitigating this matter became moot once the Foundation became fully operational in June 2001. See 213 F.Supp.2d at 445-46. "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be

relieved from." *Ackermann v. United States,* 340 U.S. 193, 198, 71 S.Ct. 209, 95 L.Ed. 207 (1950)*; Coltec,* 280 F.3d at 275 ("even if [plaintiff's] decision to settle was improvident in hindsight, the decision has been made and cannot be revisited.").

Plaintiffs' single and unsupported allegation that their dismissal was not voluntary because "Mr. Mandowsky was subject to pressure by Prof. Burt Neuborne" is not enough to establish an extraordinary circumstance resulting in unexpected hardship. (Plaintiffs' Reply Memorandum at 8; see also Kerson Affidavit Ex. J, Neuborne Memorandum.) Professor Neuborne *advised* Plaintiff Mandowsky on pursuing claims with the Foundation with the consent of Mandowsky's counsel. *(Id.)* Recognizing the "discretionary administrative proceedings dealing with East German real estate that [Plaintiff Mandowsky] [had] already commenced," Professor Neuborne explained his belief that this Court would dismiss this lawsuit on the basis of the 1950's release even as to the East German properties. *(Id.)* He wrote, "[i]nvoluntary dismissal in an American court on the merits on the basis of the 1950's release might injure the ability to process claims in Germany. I do not know what the consequence of a foreign dismissal based on a release would be on the discretionary German administrative proceedings--but it certainly can't be good. Nor do I know how the Foundation would treat a claim that had been judicially found by an American court to have been released. My guess is that the claim would be rejected." *(Id.)* Professor Newborne warned Plaintiff Mandowsky that "[w]ith

all its uncertainties and flaws ... [Plaintiff] had a better chance to recover in the Foundation than in an American court ... though, that [he] did not know ... what effect the 1950's release might have." *(Id.)*

*238 Furthermore, there is no indication that Professor Neuborne's purported assurances were binding on the Foundation. In fact, the lone memorandum *submitted by Plaintiffs* in support of this allegation, indicates that Professor Newborne told Plaintiff Mandowsky that "[he] had no expertise concerning [Plaintiffs'] case," that "[his] primary loyalty [was] to the German Foundation," and that "as a trustee of the Foundation, [he] was personally committed to assuring fair treatment for property claimants like [Plaintiff], but that no guarantees were possible." (Kerson Affidavit Ex. J, Neuborne Memorandum (emphasis added).)

Plaintiff Mandowsky's reliance on Professor Neuborne's advice does not translate into the kind of grave consequences contemplated under Rule 60(b)(6). *See Klapprott v. United States,* 335 U.S. 601, 336 U.S. 942, 69 S.Ct. 384, 93 L.Ed. 266 (1949); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) ("[Rule 60(b)(6)] should only be applied in 'extraordinary circumstances.' "); *id.* at 873, 108 S.Ct. 2194 (Rehnquist, C.J., dissenting) ("This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved."). As this Court explained, the Plaintiffs litigating their cases in the United States "were given a choice. They could either voluntarily dismiss their claims with

prejudice, and file claims for compensation with the German Foundation, or they could continue to pursue litigation." 213 F.Supp.2d at 443-44. Moreover, Plaintiff Mandowsky is a sophisticated party, represented by both domestic and German counsel.

Based on the record, his reliance on the advice of Professor Neuborne appears facially sound, and cannot now be used to undermine an evenhanded settlement. The denial of relief by a foreign tribunal cannot serve as a basis for rescinding the decision to dismiss.

B. The Relief Sought By Plaintiffs Would Ultimately Prove Futile

[4] Dresdner Bank correctly argues that reopening Plaintiffs' voluntarily dismissed action would be a futile exercise. Although the Third Circuit has not conclusively ruled on the issue, it is well-established in other Circuit Courts of Appeals that a Rule 60(b) movant "must show a 'meritorious' claim or defense." 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.24[2] (3d ed.2006); *see also Lasky v. Continental Products Corp.*, 804 F.2d 250, 256 & n. 10 (3d Cir.1986) (in dicta, citing to Moore's Federal Practice regarding other " 'relevant factors and propositions,' that the district court may consider in exercising its discretion on a Rule 60(b) motion" including "whether there is merit in the defense or claim," but noting that those factors were not applicable in *Lasky*); *see, e.g., Lepkowski v. United States Dept. of Treasury*, 804 F.2d 1310, 1314

(D.C.Cir.1986) ("motions for relief under Rule 60(b) are not to be granted unless the movant can demonstrate a meritorious claim or defense"); *cf. Local 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir.1992) ("while a movant, in order to set aside a judgment, need not establish that it possesses an ironclad claim or defense which will guarantee success at trial, it must establish a potential meritorious claim or defense which, if proven, will bring success").

Plaintiffs who have pursued their Holocaust-related claims within the United States courts have faced ineluctable motions to dismiss and for summary judgment based on, *inter alia*, the political question doctrine and international comity. 213 F.Supp.2d at 444 (noting that Plaintiffs who "opted against the Foundation and continued to pursue relief through litigation ... would be confronted by defendants' motions to dismiss supported by the United States' Statement of Interest, advocating dismissal 'on any valid legal ground' "); *see e.g., Sampson v. Fed. Republic of Germany & Claims Conf.*, 250 F.3d 1145 (2d Cir.2001) (affirming dismissal against Germany based on sovereign immunity); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 n. 12 (11th Cir.2004) (affirming dismissal based on international comity but disagreeing with this Court's holding in *Frumkin v. JA Jones, Inc. (In re Nazi Era Cases Against German Defendants Litigation)* and finding that "[a]lthough the executive's statement of interest is entitled to deference, it does not make the litigation non-justiciable"); ***239** *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 71-72 n.

16 (2d Cir.2005) (disagreeing with the 11th Circuit's reasoning in *Ungaro-Benages* and expressing its view that the political question doctrine might apply in a factually similar case involving the Republic of Austria); *Wortham v. Karstadtquelle AG,* 153 Fed.Appx. 819 (3d Cir.2005) (per curiam) (affirming this Court's dismissal of the complaint for lack of personal jurisdiction); *Frumkin v. JA Jones, Inc. (In re Nazi Era Cases Against German Defendants Litigation),* 129 F.Supp.2d 370, 372, 373 n. 4 (D.N.J.2001) (dismissing forced labor suit on the grounds that claims presented nonjusticiable political questions, and in the interest of international comity); *Gross v. German Found. Indus. Initiative (In re Nazi Era Cases Against German Defendants Litigation),* 320 F.Supp.2d 235 (D.N.J.2004) (dismissing suit concerning settlement interest obligations because the claims were nonjusticiable as a result of the political question doctrine); *Rozenkeir v. Schering AG (In re Nazi Era Cases Against German Defendants Litigation),* 334 F.Supp.2d 690 (D.N.J.2004) (dismissing medical experimentation suit on the ground of nonjusticiability), appeal docketed, No. 04-3934 (3d Cir. Oct. 13, 2004).

[5] If this Court were to grant Plaintiffs' requested relief, it would be faced with Dresdner Bank's motion to dismiss pending at the time of Plaintiffs' Stipulation of Dismissal. [FN6] See 213 F.Supp.2d at 451 (citing Shaffer v. GTE N., 284 F.3d 500, 503 (3d Cir.2002)). The Court would have to consider the impact of the 1956 settlement agreement, the Berlin

Court's dismissal, and the denial of claims by the Foundation.

> FN6. Since Plaintiffs request the Court to vacate the IOM's decision and return this case to the Court's trial calendar, the Court assumes Plaintiffs have abandoned their cross-motion to remand this suit to the New York state courts. Dresdner Bank's motion presented the following grounds for dismissal:
>
> 1. *Political Question and Comity.* This case is not justiciable because it presents political questions which no United States court may decide. This Court should also abstain from adjudicating this case under principles of comity....
>
> 2. *Settlement/Accord and Satisfaction/ Release.* The claim asserted was conclusively settled years ago in 1956 and was released in the 1956 Settlement.
>
> 3. *Res Judicata.* The action is barred by res judicata because: (A) the 1956 Settlement was expressly confirmed by the Berlin court in which the Estate had asserted its claim, (B) after the reunification of Germany, the Estate pursued a claim again in Berlin to avoid the 1956 Settlement and that claim was dismissed by a judgment of the Berlin court in 1993, and (C) the claim has now been rejected twice by the Foundation in Germany.

> 4. *Statute of Limitations and Laches.* Even if, *arguendo,* the claim had not been settled and released in 1956, the claim was long ago barred by the applicable statute of limitations and the doctrine of laches.
>
> (Dresdner Bank's Memorandum in Opposition at 12) (emphasis in original.)

1. This Case Presents a Nonjusticiable Political Question

Plaintiffs demur to Dresdner Bank's view that this lawsuit is a foregone conclusion. (See Plaintiffs' Reply Memorandum at 9-12; Plaintiffs' Oct. 25, 2000 Memorandum of Law in Support of Their Motion for Remand and in Opposition to Defendant's Motion to Dismiss at 25-36.) Their insistence that Dresdner Bank is frustrating "the clear intention of the U.S. Deputy Treasury Secretary ... to compensate the Nacher Family," (*see* Plaintiffs' Reply Memorandum at 10), however, does not take this case out of the realm of issues already covered by *Frumkin v. Jones (In re Nazi Era Cases Against German Defendants Litigation),* in which this Court agreed with two similar cases, *Burger-Fischer v. Degussa AG,* 65 F.Supp.2d 248, 267 (D.N.J.1999) and *Iwanowa v. Ford Motor Co.,* 67 F.Supp.2d 424 (D.N.J.1999), "that the claims of individual plaintiffs against private German defendants were no longer properly justiciable in American courts." 129 F.Supp.2d at 378. Although *Burger-Fischer, Iwanowa,* and *Frumkin* concerned allegations of slave labor rather

than property claims, those conclusions ring no less true here. [FN7] "For almost 60 years now, U.S. courts have held consistently that the political *240 question doctrine made Holocaust-era claims nonjusticiable." *Gross,* 320 F.Supp.2d at 253 (D.N.J.2004).

> FN7. To be sure, the Foundation provides an avenue for relief for property claims. As the United States notes in its Statement of Interest that "[i]ndividuals who had property 'aryanized' or otherwise stolen or damaged by German companies ... are eligible to receive payments." (Statement of Interest at 9.)

Moreover, the United States submitted a Statement of Interest "taking no position on the merits of the underlying claims or arguments" but urging dismissal of this case. (*See* Statement of Interest at 2; February 10, 2006 Dept. of Justice Letter to Court confirming "that the Statement of Interest of the United States filed on October 23, 2000 in the MDL proceeding is still considered part of the record in this individual action.") The Statement of Interest provides:

The President of the United States has concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the Nazi era and World War II, including without limitation those relating to compensation for slave and forced labor,

"aryanization" or other confiscation of, damage to, or loss of property (including banking assets and insurance policies) ... Accordingly, the United States believes that all asserted claims should be pursued through the Foundation instead of the courts.

(Id. at 14-15.)

Any conclusion other than that the situation presented implicates the political question doctrine would run afoul of this Court's previous ruling in Frumkin and under Supreme Court precedent. [FN8] *See* 129 F.Supp.2d at 382-83. Although the Circuit Courts of Appeals have reached differing conclusions on the impact of the government's Statement of Interest, [FN9] regardless of how this issue ultimately unfolds in the Third Circuit, Plaintiffs' case still presents concerns under international comity.

> FN8. The political question doctrine dictates that a court refuse to adjudicate a claim upon which there is
>
> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an

unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from

multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

FN9. As previously noted, the Eleventh Circuit that the Government's Statement of Interest alone does not render a case nonjusticiable, providing:

[T]he plain text of the Foundation Agreement anticipates that federal courts will consider claims against German corporations.... [T]he Agreement itself provides that it does not provide an independent legal basis for dismissal. Thus, the executive opted not to settle these claims or to transfer the claims to the Foundation, although it had the power to do so.

As a result, federal court consideration of the present case does not reflect a lack of respect for the executive nor does it interfere with American foreign relations. The United States is in full compliance with the Foundation Agreement so long as it files a statement of interest to courts urging respect for the

> Foundation as the exclusive forum to resolve these claims.... A statement of national interest alone, however, does not take the present litigation outside of the competence of the judiciary.
>
> *Ungaro-Benages*, 379 F.3d at 1235-36 (citation and footnote omitted) (also cited in Judge Straub's dissent in *Whiteman*, 431 F.3d at 62 (Straub, J., dissenting)); *but see Whiteman*, 431 F.3d at 71-72 n. 16.

2. This Case Raises International Comity Concerns

[6] International comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895); *see also Stonington Partners v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 126 (3d Cir.2002); *Frumkin*, 129 F.Supp.2d at 386. There is perhaps no case more deserving of the "practice, convenience, and expediency" of international comity than one in which the decisive issues have been consistently and competently resolved by foreign courts. See *241 *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir.1971). "Every sovereign State is bound to respect the independence of every other sovereign

State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303, 38 S.Ct. 309, 62 L.Ed. 726 (1918) (citing *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897)); 129 F.Supp.2d at 388. "[A] court may, within its discretion, deny comity to a foreign judicial act if it finds that the extension of comity 'would be contrary or prejudicial to the interest of the' United States." *Philadelphia Gear Corp. v. Philadelphia Gear, S.A.*, 44 F.3d 187, 191 (3d Cir.1994); 129 F.Supp.2d at 387. "Additionally, a court must evaluate whether a true conflict exists between the law of the United States and that of a foreign jurisdiction." 129 F.Supp.2d at 387 (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993)).

Plaintiffs ask this Court to "vacate the IOM decision," to ignore the Berlin Court's 1993 decision, and with regard to the 1956 settlement, to rule that "East German assets ... were not included in the ... agreement" because "West Germany had no jurisdiction or competence over claims in East Germany." (Kerson Affidavit at ¶ 19; Plaintiffs' Reply Memorandum in Support of Remand and in Opposition to Defendant's Motion to Dismiss at 5; Plaintiffs' November 16, 2000 Letter to This Court Regarding Oral Argument; Plaintiffs' Reply Memorandum in Support of Remand and in Opposition to Defendant's Motion to Dismiss at 5.)

The principles of international comity, however, would compel this Court to refrain from considering the merits of Plaintiffs' allegations. The United States' Statement of Interest expresses the government's view that this lawsuit would interfere with the ultimate success of the Foundation. (See Statement of Interest at 2.) "The United States government has consistently supported the Foundation as the exclusive forum for the resolution of litigation against German corporations related to their acts during the National Socialist era." *Ungaro-Benages,* 379 F.3d at 1239. Since the government has announced that the German government and its administrative instrumentalities is best suited to deal with "the twin concerns of justice and urgency," (Statement of Interest at 2), underlying these claims, and since the German courts and the Foundation through the IOM have decided the issues openly and fairly, were this Court to sit in quasi-appellate review of those decisions it would violate the quintessential standards of international comity. It is impossible to both support the operation of the Foundation and enter a judgment in Plaintiffs' favor; therefore, in keeping with its opinion in *Frumkin,* this Court would likely abstain under the doctrine of international comity. See 129 F.Supp.2d at 386-88.

B. Public Policy Interests Weigh In Favor of Denying Plaintiffs' Motion

The Third Circuit recognizes a strong public policy favoring settlements of disputes, the finality of judgments and the termination of litigation. [FN10]

See American Iron & Steel Institute v. Environmental Protection Agency, 560 F.2d 589 (3d Cir.1977); *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir.1982); *Lasky*, 804 F.2d at 256 & n. 10 (3d Cir.1986); *Bank of America National Trust and Savings Assoc. v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir.1986); *Eckersley v. WGAL TV Inc.*, 831 F.2d 1204, 1209 (3d Cir.1987); *Keystone Shipping Co. v. Home Ins. Co.*, 840 F.2d 181, 184 (3d Cir.1988); ***242** *State of New Jersey Department of Environmental Protection v. Gloucester Environmental Management Services, Inc.*, 668 F.Supp. 404, 407 (D.N.J.1987); *Johnston Dev. Group, Inc. v. Carpenters Local Union No.* 1578, 728 F.Supp. 1142, 1148 (D.N.J.1990). "Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should." *Pennwalt*, 676 F.2d at 80. Indeed, "[p]ublic policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest ... [There is] no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be therefore concluded by the judgment of the tribunal to which he has submitted his cause." *Baldwin v. Iowa State Traveling Men's Asso.*, 283 U.S. 522, 526, 51 S.Ct. 517, 75 L.Ed. 1244 (1931).

FN10. "Unlike typical international agreements, the Agreement between the Governments of the

> Federal Republic of Germany and the United States of America concerning the Foundation 'Remembrance, Responsibility and the Future' is not a government-to-government claims settlement agreement.
>
> Rather than extinguishing the legal claims of its nationals or anyone else, the United States merely helped facilitate an agreement between victims, German Industry, and the German Government. By acting in this manner, the United States' goal was to bring expeditious justice to the widest possible population of survivors, and to help facilitate legal peace." 198 F.R.D. at 434.

[7] Plaintiffs essentially argue that they should not be bound by their settlement with Dresdner Bank or by the consistent conclusions of the other tribunals that have heard and denied their claims. But allowing Plaintiffs to come back to this Court and challenge the IOM's decision after voluntarily dismissing their lawsuit would undermine the "legal peace" that resulted in the Foundation's creation and it would open the proverbial floodgates to relitigation of similar claims. The fact that Plaintiffs voluntarily dismissed their suit to avail themselves of an alternative forum, of which they actively took part in, solidifies this Court's conclusion that Plaintiffs got what they bargained for--an opportunity to present their claims with the Foundation.

For the reasons set forth above, Plaintiffs' motion is **denied.**

An appropriate Order follows.

D.N.J.,2006.
In re Nazi Era Cases Against German Defendants Litigation
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Motions, Pleadings and Filings (Back to top)

- 2006 WL 385507 (Trial Motion, Memorandum and Affidavit) Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Relief Under Federal Rule of Civil Procedure 60(b) (Jan. 23, 2006)

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NOT PRECEDENTIAL

UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3365

IN RE: NAZI ERA CASES AGAINST
GERMAN DEFENDANTS LITIGATION

RONALD H. MANDOWSKY;
SETH B. FELDMAN, as the Co-Executors
Of the Estate of Ferdinand Nacher;
RONALD H. MANDOWSKY, as Representative
Of the Heirs of the Estate of
Ignatz Nacher,
Appellants

v.

DRESDNER BANK AG

On Appeal from United States District Court
for the District of New Jersey
(D.C. Civil Nos. 00-cv-04986, 98-cv-04104)
District Judge: The Honorable William G. Bassler
submitted Under Third Circuit LAR 34.1 (a)
July 11, 2007 Before: RENDELL, AMBRO and
NYGAARD, Circuit Judges.
(Filed: July 20, 2007)

OPINION OF THE COURT

NYGAARD, Circuit Judge:

Appellants Ronald H. Mandowsky, and Seth B. Feldman as the Co-Executors of the Estate of Ferdinand Nacher and Ronald H. Mandowsky, as the Representative of the Heirs of Estate of Ignatz Nacher, appeal the Ditrict Court's denial of their Motion for Relief from Judgment filed pursuant to FED.R.CIV.P.6 (b) motions: (1) Rule 60(b). The District Court specified three reasons for denying the Appellants' 60(b) motions: (1) Rule 60 (b) was not designed to release a litigant from a freely chosen litigation strategy; (2) Rule 60 (b) is not available when granting relief would ultimately prove futile; and (3) broader public interest would not be forward or enhance by granting relief under the rule. After thorough study of the briefs filed by the parties, as well affirm essentially for the reason stated by the District Court. The facts and procedural history of this case are well know to the parties and the court, and it is not necessary that we restate them here.

The reason why we write an opinion of the court are threefold: to instruct the District Court, to educate and inform the attorneys and parties, and no explain our decision. We use a not-precedential opinion in cases in which a precedential opinion is rendered unnecessary because the opinion has no

institutional or precedential value. See United States Court of Appeals for the Third Circuit, internal Operating Procedure(I.O.P.) 5.3 Under the usual circumstances when we affirm by not-Precedential opinion and judgement, we briefly set forth the reason supporting the
Court's decision. In this case, however, we have concluded that neither a full memorandum explanation nor a precedential opinion is necessary. Judge Bassler's ruling is a thorough statement of his reasoning and fully supports his order. No further refutation of the Appellants' allegations of error is necessary.

Hence, we believe it unnecessary to further opine, or to offer additional explanations and reasons to those given by the District Court in its opinion dated the 6th day of July, 2006, we will affirm.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) July 11, 2007.

On consideration, it is now here ORDERED AND ADJUDGED by this Court that the order of the said District Court entered on July 6, 2006, be, and the same is hereby AFFIRMED. Costs are taxed against the Appellants.

All of the above in accordance with the opinion of this Court.

ATTEST:

S/ Marcia M. Waldron
Clerk

Date: July 20, 2007

Certified as a true copy and issued in lieu of a formal mandate on 8/14/07

Teste: s/Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit